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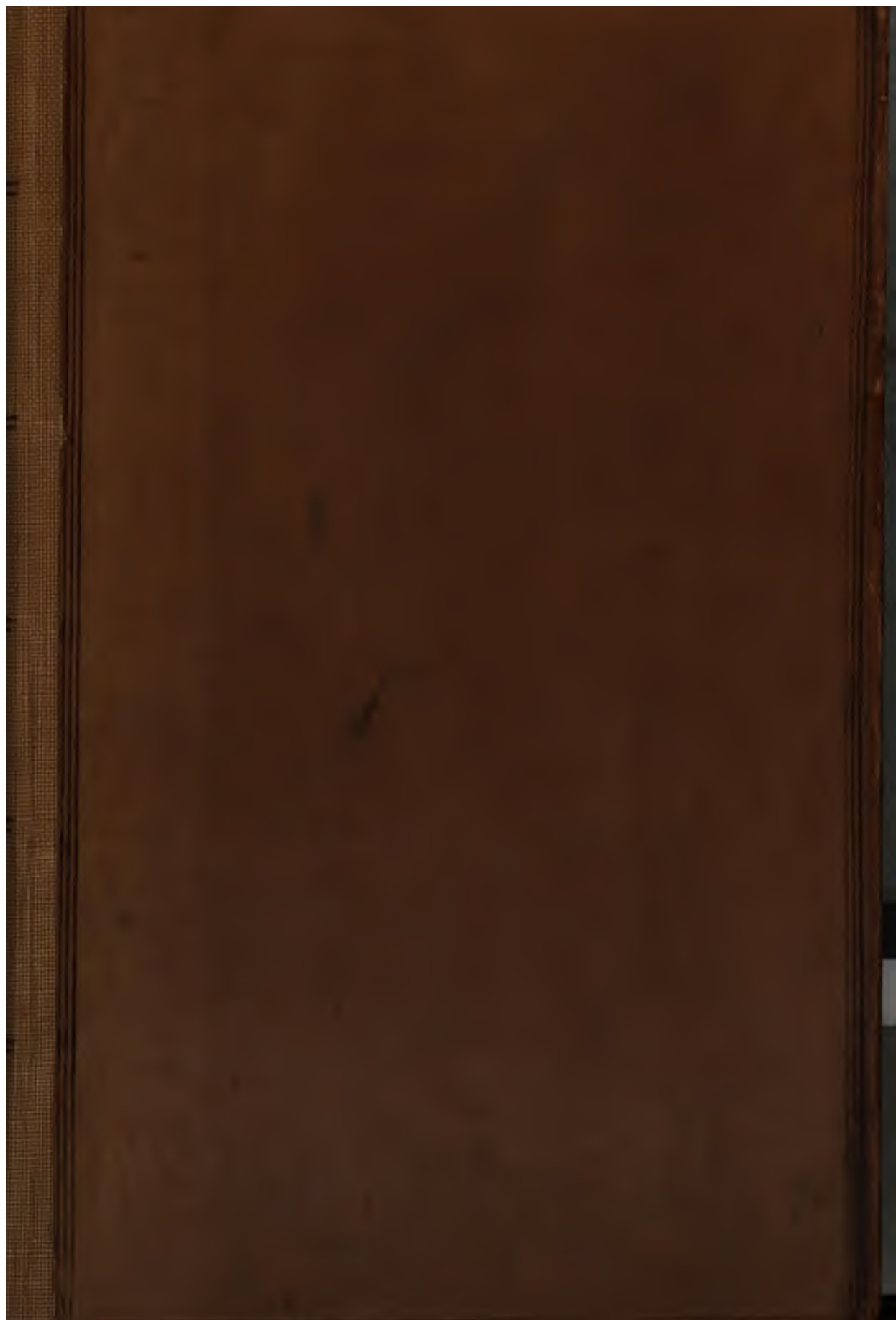
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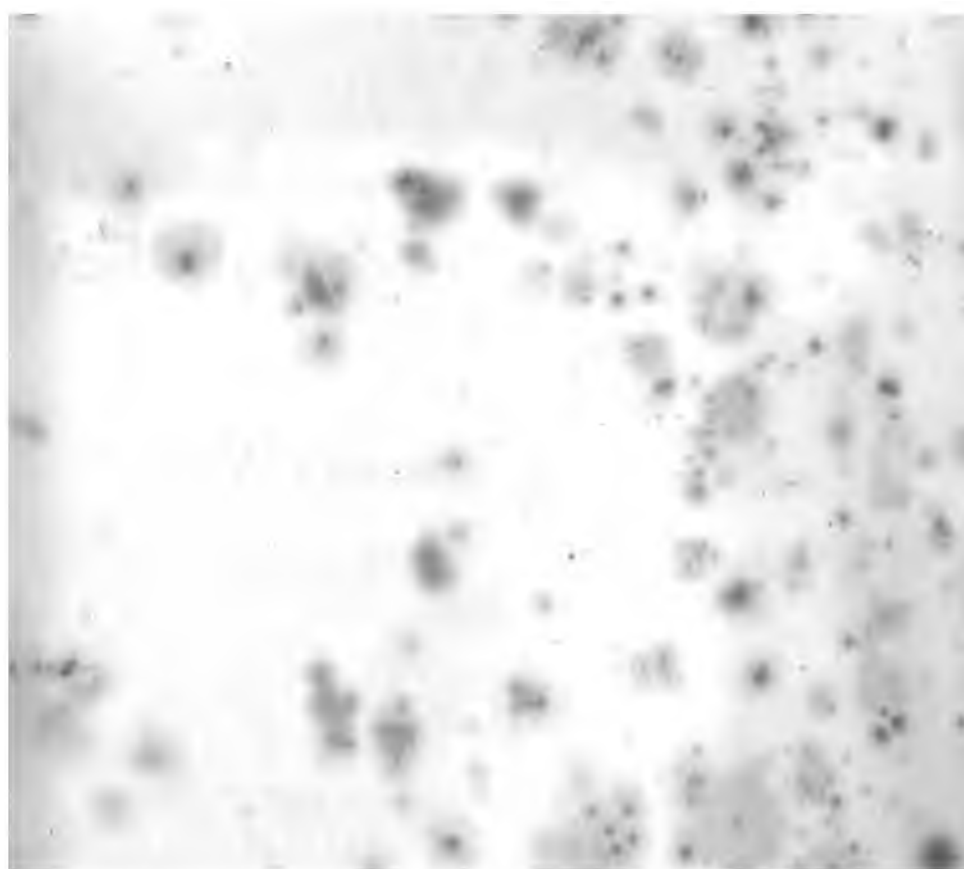
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M. 185



REPORTS OF CASES

ARGUED AND DETERMINED

IN.

The Courts of Common Pleas

AND

Exchequer Chamber,

WITH

TABLES OF THE NAMES OF THE CASES AND PRINCIPAL MATTERS.

BY

JOHN BAYLY MOORE, Esq., OF THE INNER TEMPLE,

AND

JOSEPH PAYNE, Esq., OF LINCOLN'S INN,

BARRISTER AT LAW.

VOL. III.

CONTAINING THE CASES FROM EASTER TERM, 10 GEO. IV. 1829,

TO

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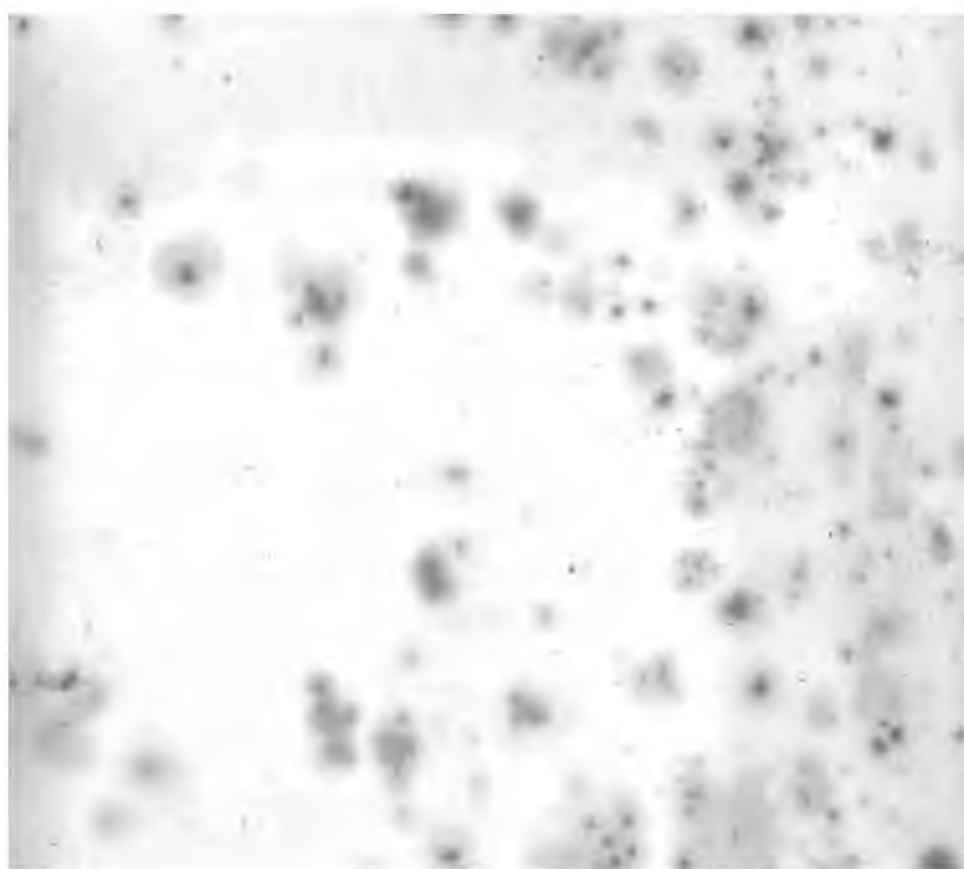
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CASES

ARGUED AND DETERMINED

IN THE

Courts of Common Pleas

AND

Exchequer Chamber,

IN EASTER TERM,

IN THE TENTH YEAR OF THE REIGN OF GEORGE IV.

BURNS *v.* CARTER, Gent., and Others.

Friday,
May 8th.

THIS was an action of trespass, brought by the plaintiff, the occupier of a house in the *Clink* Liberty, in the Borough of *Southwark*, against the defendants, commissioners under the *Clink* paving-act, 52 *Geo.* 3, c. xiv.

The time limited for the commencement of actions for any thing done in pursuance of any local paving-act, is regulated by the metropolis general paving-act, 57 *Geo.* 3, c. xxix. s. 136, which in effect repeals the limitation clause in the *Clink* Liberty paving-act, 52 *Geo.* 3, c. xiv. s. 122.

At the trial, before the Lord Chief Baron, at the last Assizes for *Surrey*, it appeared that the defendants, on the 13th *July*, 1827, in the exercise of their powers under the 52 *Geo.* 3, c. xiv. s. 39(a), purchased the house in question, which was required by them for the purposes of the act; and, having served the plaintiff with a notice to quit, forcibly ejected him, disallowing his claim for compensation. Notice of this action was given to the defendants on the 20th *August*, 1827, but the suit was not commenced until the 11th *January*, 1828.

(a) By which the commissioners appointed under that act are empowered to make compensation to the occupiers of premises with-
in the liberty, if they require them to quit, after purchasing the premises under that act.

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BURNS
v.
CARTER.

It was objected, for the defendants, that the action should have been commenced within *three* calendar months next after the entry of the defendants, in pursuance of the statute 57 Geo. 3, c. xxix. s. 136 (a), which, it was contended, had repealed the 122nd section of the 52 Geo. 3, c. xiv. (b), as far as regarded the time of commencing the action.

The Lord Chief Baron, being clearly of opinion that the objection was well founded, directed a nonsuit.

Mr. Serjeant *Andrews* now applied for a rule *nisi*, that the nonsuit might be set aside, and a new trial had.—The question is, whether the general paving-act, 57 Geo. 3, c. xxix. (c) over-rides the previous local act, 52 Geo. 3, c. xiv. The proceeding by the defendants was exclusively under the local act, and could not be under the general act; as the latter merely gave to the commissioners larger powers, but did not provide for compensation in cases falling within the local act. The 138th section of the 57

(a) By which it is enacted, “That no action or suit shall be commenced against any person or persons, for any thing done in execution or pursuance of any *local act* or acts of Parliament, relating, either exclusively or jointly with any other objects or purposes, to the pavement of any parochial or other district within the jurisdiction of this act, until after twenty-one days’ notice in writing, signed by the person or persons intending to bring such action or suit, and specifying his or their real residence, and his or their trade or profession, shall be thereof given to the clerk or clerks of the said commissioners or trustees, or other persons having the control of the pavements

in any parochial or other district within the jurisdiction of this act, wherein any fact may be committed, or for which such action or suit may be brought; nor after sufficient satisfaction shall be made or tendered; *nor after three calendar months next* after the fact may be committed for which such action or suit shall be so brought.”

(b) Which enacts—“That no action shall be commenced for any thing done in pursuance of that act, until twenty-one days’ notice thereof shall be given in writing, to the clerk or treasurer, or after *six calendar months* after the fact committed, for which such action shall be brought.”

(c) Commonly called *Michael Angelo Taylor’s Act*.

Geo. 3, c. xxix. (a), clearly shews that the limitation contained in the 136th section, was intended only to apply to that act, and not to control any local act. The two acts were meant to be co-operative. This case falls within the provisions of the 52 *Geo. 3*, and therefore the action was commenced in time.

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v.
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Lord Chief Justice BEST.—The Lord Chief Baron is extremely cautious in forming an opinion, and generally comes to a right conclusion. In this case, he does not appear to have entertained any doubt, nor do I think that there is room for doubt. By the 136th section of the general paving-act, it is expressly enacted, that no action shall be commenced for any thing done in execution or pursuance of any *local* act relating, either exclusively or jointly with any other objects or purposes, to the pavement of any district within the jurisdiction of that act, after *three* calendar months next after the fact may be committed for which such action shall be brought. Here, the action was brought for an act done by the defendants, as commissioners, under the local act 52 *Geo. 3*, to which the 136th section of the 57 *Geo. 3* applies, and therefore the action should have been commenced within three months, the time limited by that clause. I think it impossible that the words of a statute can be clearer.

Mr. Justice PARK.—It has been ingeniously put by my brother *Andrews*, that, as the defendants proceeded solely under the local act, the time for bringing the action must be regulated by that act; and, therefore, that this

(a) By which it is enacted—
“That neither any act or acts of Parliament, relating either exclusively to the paving or repairing the pavements of the streets or public places in any parochial or other district within the jurisdiction of that act, or relating thereto jointly with any other object or purpose, nor any clause, matter, or provision therein contained, shall be thereby repealed.”

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 ———
 BURNS
 v.
 CARTER.

action was commenced in time, it being brought within *six* months after the fact committed. But, as the 136th section of the general paving-act enacts, that no action shall be commenced for any thing done in execution of any *local* act, after *three* calendar months next after the fact committed, and as this action was not brought within that time, it appears to me that this argument cannot be supported.

Mr. Justice BURROUGH.—The words of the 136th section of the general paving-act are express, and we must give them full effect.

Mr. Justice GASELEE concurred.

Rule refused.

Saturday,
May 9th.

PROVIS and MARGARET ROWE, Demandants; REED,
 Tenant.

Parol evidence of declarations made by a testator, having a tendency to disaffirm the disposition of his real property in a will previously executed by him, is not admissible to invalidate such will.

In a suit by the heir-at-law of a testator, imputations being cast upon the character of a deceased attorney by whom the will was prepared, and who was one of the attesting witnesses, charging him with fraud in the execution of the will:—*Held*, that the devisee might call witnesses to shew the general good character of such attorney.

THIS was a writ of entry, *sur abatement*. At the trial before Mr. Justice *Gaselee*, at the last Assizes for *Cornwall*, the facts appeared to be as follow:—

The demandants claimed the property sought to be recovered by this suit, as heirs-at-law of one *Henry Sara*, who died seised thereof on the 31st *August*, 1802, and the tenant had been in possession ever since, as devisee under his will. The tenant, having admitted the demandant's pedigree, and seisin, as therein stated, was allowed to begin, and called a witness, one *Mrs. Bilkie*, a servant of the testator, who proved that she was one of the attesting witnesses to his will, and that he executed it in the presence of herself and two other persons, one of

whom was a Mr. *Scott*, an attorney, who prepared the will, and the other a lady named *Incedon*, both of whom were since dead. On her cross-examination, the witness was asked whether she had not given a different account of the transaction. She admitted that she had. A letter was then produced, written by one *Goodman*, who proved that he wrote it at the dictation of the last witness, and in which she stated, that only two attesting witnesses, *viz.* herself and *Scott*, were present at the execution of the will; and that the name of *Incedon* was added at *Scott's* office, the day after the death of *Sara*. It appeared, however, that this letter had been procured at the instance of the demandants' attorney.

The demandants then called one *Rapson*, a legatee under the will, who proved, that, the day after the testator's death, he called at the office of *Scott*, at *Penryn*, and desired to see the will; that *Scott* shewed it to him, and said, "There is an over-sight; the will is not properly executed; but it is not of much consequence; we can manage it between ourselves;" that *Scott* then called Mrs. *Incedon*, who was his mother-in-law, into the office, and desired her to subscribe her name to the will; which she accordingly did.

Certain declarations of the testator were then offered in evidence. *Rapson* deposed, that the testator, talking with him in his last illness, said, "That he wished him (the witness) to be executor to a will that he proposed making;" that a person of the name of *Mills*, who was present, said to *Sara*, "Have you not made a will already?" To which the latter answered: "*Tom Reed* (the tenant) has been trying to get hold of my property; but neither he nor his ever shall have it; *Scott* drew up a paper, and they got me to sign it; but, never fear, I know that it is not worth to *Reed* one farthing." That, at another time, the testator said to *Margaret Rowe* (one of the demandants): "My land goes to my own family.

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Provis,
Demandant;
Reed,
Tenant.

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PROVIS,
Demandant;
REED,
Tenant.

Peggy, remember the land is yours. If I do not live to make my will, when I am dead see that you are righted." And that, shortly afterwards, the testator died.

These declarations were rejected by the learned Judge.

The demandants then called several other witnesses to prove what Mrs. *Bilkie* had said of the transaction.

On the part of the tenant, evidence was offered and admitted, to shew the good character of *Scott*, and, it being proved by several respectable witnesses, that he was a man of the strictest honour and integrity, the Jury returned a verdict for the tenant.

Mr. Serjeant *Taddy* now applied for a rule *nisi* that this verdict might be set aside, and a new trial had, on the grounds, that evidence of the declarations of the testator had been improperly rejected, and that the testimony of the witnesses called to support the character of *Scott*, ought not to have been received.—*First*, the declarations made by the testator were admissible, both parties to the suit deriving title from, and claiming under him, *viz.* the one as heir-at-law, the other as devisee. Declarations with respect to his property, made by a deceased ancestor, through whom two parties claim, are admissible on the ground of his being a privy in estate. Here, the declarations were not offered in contravention of the will, but only to corroborate the facts proved by one of the demandants' witnesses, *viz.* that it had not been duly executed; and, as the testator said that his land went to his own family, it must be inferred that he did not intend that it should pass to the tenant, in exclusion of his heirs. *Secondly*, the character of *Scott* was irrelevant to the matter in issue in the cause. The general rule, as laid down in *Buller's Nisi Prius* (a), is, "that, in all cases where a general character or behaviour is put

(a) 7th edit. by Bridgman, p. 295.

in issue, evidence of particular facts may be admitted; *but not* where it comes in collaterally." That rule is not to be confined to the case of an attesting witness to a will, but applies to the attestation of every instrument. At all events, if general evidence of the good character of *Scott* were admissible, the demandants had a right to impeach or disprove it, which they were not prepared to do at the trial, as they had no idea that such evidence would have been offered, much less received.

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PROVIS,
Demandant;
REED,
Tendant.

[Mr. Justice *Gaselee*.—In *Doe d. Stephenson v. Walker* (a), where the attesting witnesses to a will were dead, and the will was impeached on the ground of fraud in the procuring of it, and that fraud was imputed to the witnesses, Lord *Kenyon* held, that evidence might be called to their characters. And, in the subsequent case of *The Bishop of Durham v. Beaumont*, Lord *Ellenborough* said (b): "I fully accede to the doctrine laid down in *Doe d. Stephenson v. Walker*. There, the attesting witnesses, whose character was disputed, were dead; and it was properly held, that the party claiming under the will should have the same advantage as if they had been alive. In that case, they must have been personally adduced as witnesses, when their character would have appeared on their cross-examination; and, being dead, justice required that an opportunity should be given to shew what credit was to be attached to their attestation of the will."]

These were mere *Nisi Prius* decisions. In the former case, all the witnesses concurred in saying, that the parties whose characters were attacked, were esteemed to be men of probity and respectability. Their credit, therefore, remained unimpeached. In the latter case, a witness for the plaintiff asserted one thing, and a witness for the defendant another, and direct fraud was not imputed to either; Lord *Ellenborough*, therefore, held, that evidence to general character was not admissible.

(a) 4 Esp. Rep. 50.

(b) 1 Camp. 210.

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 PROVIS,
 Demandant;
 REED,
 Tenant.

Lord Chief Justice BEST.—Two objections have been raised to the verdict in this case—*first*, that evidence has been rejected which ought to have been received—*secondly*, that evidence has been received which ought to have been rejected.

First, it has been said, that evidence of certain declarations made by the testator, was receivable to shew that the will he had made was not a valid instrument. No case has been cited, nor have we been referred to any authority, to shew us that such declarations were admissible, for the purpose of destroying or avoiding the will. We shall not now, for the first time, establish the doctrine contended for; because, if we were to hold such evidence admissible, any eaves-dropping witness might be brought forward to overturn wills, or invalidate other instruments, however important they might be. Such a doctrine is contrary to the first principles of evidence, according to which, the will itself is the best proof that can be adduced; and it ought not to be affected by vague or loose declarations, which might have been made by the party whilst in a state of intoxication, or while labouring under mental delusion, or infirmity produced by age, of which the Court could have no knowledge. It has been further said, that the declarations were admissible, as both the contending parties claim under the person who made them, and who must be considered as a common ancestor or privy in estate. But the parties claim in different rights, the one as heir-at-law, the other under the will; and the declarations of the testator were not receivable to impugn or invalidate the instrument which he himself had executed. It is true, that declarations of a common ancestor, as to the state of his family, or other matters relating to them, which are peculiarly within his own knowledge, are admissible in questions of pedigree, on account of the difficulty of proving remote facts in the ordinary mode, by living witnesses. Such declarations, however, are altogether different from those which

tend to invalidate a written instrument, or to give a different account of its execution than what appears upon the face of the instrument itself. I am, therefore, of opinion that the declarations in this case were properly rejected.

Secondly, a serious imputation was cast on the character of *Scott*, the attorney who prepared the will, and who was one of the witnesses attesting its execution. If the demandants had imputed to him a mere error in judgment, evidence as to his character ought not, perhaps, to have been received; but, if he were capable of doing the act attributed to him, *viz.* that of adding the name of an attesting witness to a will, after the death of the testator, in order to render perfect an imperfect execution of that instrument, it is not a mere attack on his moral character, it in fact amounts to a charge of forgery; and those persons who felt an interest in supporting his character, had a right to defend it. A passage has been cited from *Buller's Nisi Prius*, and relied on as furnishing a general rule on this point; and it has been said, that there is no distinction to be drawn between an attesting witness to a will, and a witness to a bill of exchange, bond, or other security of a like nature. But, instruments of that description are generally of recent date, and given within the time of living witnesses; whilst wills frequently remain undisputed until long after the death of all the parties who attested their execution. In the present case, the testator died in 1802, and the tenant has been in possession ever since. If, after a lapse of twenty-seven years, the character of a deceased subscribing witness be attacked, evidence of his good character may and ought to be received, in order to repel such attack. Courts of law lay down principles according to the necessity of the case before them. Here, the character of the deceased attorney, when attacked, could only be protected by calling witnesses to shew that he was not capable of the fraudulent conduct imputed to him. The two cases to which my brother *Gaselee* has referred,

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Tenant.

appear to me to be expressly in point. The doctrine laid down by Lord *Kenyon* in *Doe v. Stephenson*, was approved of by Lord *Ellenborough*, in the case of The Bishop of *Durham v. Beaumont*. When I was at the bar, I have repeatedly offered evidence to shew the general good conduct of a party deceased, when his character has been attacked, and have often had it tendered against me, and never objected to it; and I remember, that, having made an attack on the character of a deceased person, before Mr. Justice *Lawrence*, at *Gloucester*, (having received instructions to do so), that learned Judge allowed witnesses to be called, who proved that there was not the slightest ground to suspect that he had been guilty of the mal-practice with which he was sought to be charged. It appears to have been the constant practice of *Westminster Hall*, to allow evidence to be received as to the good character of a deceased witness, if it has been attempted to be impeached; and that practice appears to me to be better than any decision on the subject.

Mr. Justice PARK.—I am of the same opinion on both points.—The parol evidence as to the declarations made by the testator, to impeach the validity of his will, was most properly rejected. The Legislature, in order to guard against frauds in the execution of wills, have ordered certain formalities to be attended to and complied with; and we should, in effect, render the object they had in view at the time the statute was passed (*a*), a nullity, if we were to admit parol proof of declarations made by a testator, in order to defeat or impeach his own will. The time and circumstances under which such declarations are made, ought, at all events, to be considered; if not, a person whose intellects might be impaired by age or bodily infirmity, might be imposed on by a distant relation,

(*a*) 2 Car. 2, c. 3, s. 5.

or some unprincipled person, who might extort from him a declaration that he did not intend to leave his property to the person mentioned in his will, or that he meant to provide for some other poor relative. Such declarations never have been and never ought to be received. Evidence as to the general good character of the attorney who prepared the will and attested its execution, was properly received, not only by the general practice of *Westminster Hall*, but by the cases to which we have been referred.

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PROVIS,
Demandant;
REED,
Tenant.

Mr. Justice BURROUGH.—In the case of *Doe d. Teague v. Wood*, lately tried before me at *Exeter*, where the question turned on the validity of a will, one of the attesting witnesses swore that the testator did not know what he was doing at the time he signed it; another swore the reverse; and the third witness, the attorney who prepared the will, being dead, and it being suspected that he was accessory to the imperfect execution, I allowed witnesses to be called to give evidence of his general good character; which being fully established, I left it to the Jury to consider the contradictory testimony of the two other witnesses, at the same time saying, that the good character of the deceased ought to weigh in favour of the will having been properly executed by the testator. Here, the testator did not declare that he had not made a will, or that his real estate was not to pass to the tenant, as the devisee named in the will; he merely said, that *Tom Reed* (the tenant) had been trying to get his property, which, for any thing that appears to the contrary, might refer to his personal property only.

Mr. Justice GASELEE concurred.

Rule refused.

1829.

Saturday,
May 9th,

JONES v. NICHOLLS.

A copy of an order of the Insolvent Debtors' Court, referring the matters of an insolvent's petition to the Justices at Sessions, in *Wales*, in pursuance of the statute 7 Geo. 4, c. 57, s. 41, together with an affidavit of the service of the order upon the creditors, were tendered in evidence under the 76th section of the act, which makes copies of the petition, schedule, order, and proceedings in the matters of the prisoner's petition, receivable in evidence, on their being certified by the proper officer, and sealed with the seal of the Court. The copy of the affidavit was certified and sealed as required by the act, but the copy of the order, which was affixed to the affidavit with a pin, was neither sealed nor certified:—*Held*, that the certificate and seal on the copy of the affidavit was a sufficient verification of both instruments.

In an action for maliciously arresting the plaintiff, and taking him in execution at the defendant's suit, it seems that the latter is liable, although the plaintiff was taken in execution at the instance of the defendant's attorney, and without the knowledge or assent of the defendant.

THIS was an action on the case for maliciously arresting the plaintiff, and causing him to be detained in custody, and afterwards taking him in execution at the defendant's suit.

At the trial, before Mr. Justice *Park*, at the last Assizes at *Hertford*, it appeared, that, eleven months previously to the arrest, *viz.* on the 28th of *February*, 1827, the plaintiff had been discharged by an order of Justices, at the General Quarter Sessions for the county of *Glamorgan*, before whom he was brought, in pursuance of the 41st section of the Insolvent Debtors' Act, 7 Geo. 4, c. 57 (a).

The plaintiff offered in evidence copies of the order of the Insolvent Debtors' Court, referring the matters of his petition to be heard by the Justices, and of the affidavit of the service of such order upon the creditors. The certificate of the officer and seal of the Court appeared on the copy of the affidavit only, and not on the copy of the order, which was annexed or fastened to the copy of the affidavit with a pin.

For the defendant, it was objected, that the copy of the order could not be read, as it did not bear the office seal, nor the certificate of the proper officer of the Court; and it was contended that it was necessary to give the order

(a) By which it is enacted—
“That, where any prisoner (applying for relief under the act) shall be in any gaol within the principality of *Wales*, or town of *Berwick-upon-Tweed*, the Court shall order such prisoner to be brought before the Justices of the Peace for the county, city, town,

liberty, or place wherein such gaol shall be situate, in open Court, at their General or General Quarter Sessions of the Peace, or at some adjournment thereof, and the matters of the petition of such prisoner shall be heard by such Justices in pursuance of such order.”

itself in evidence, as that alone gave jurisdiction to the Justices to discharge the plaintiff, under the 41st section of the act.

On the part of the plaintiff, it was submitted, that, as one of the papers produced was a copy of an affidavit made in the Insolvent Debtors' Court, in which it was sworn that the paper annexed to it was a true copy of the order of the Court for the hearing by the Justices; and, as the copy of the affidavit was under the seal of the Court, and duly certified by the officer to be a true copy of such affidavit; it was good evidence of the order, by virtue of the 76th section of the statute (a).

The learned Judge took a note of the objection, but allowed the cause to proceed.

The defendant's attorney, who was called as a witness, stated, that the plaintiff had been taken in execution by his (the attorney's) mistake; that he had acted under the advice of his special pleader; and that the defendant had not at all interfered since the arrest, or been cognizant of any of the subsequent proceedings, which had been carried on by the attorney alone.

The learned Judge, in effect, told the Jury that the defendant was answerable, although the plaintiff might have been taken in execution, in consequence of the mistake or negligence of the defendant's attorney.

The Jury accordingly returned a verdict for the plaintiff—damages 40*l*.

(a) By which it is enacted—
“That a copy of the petition, schedule, order, and other orders and proceedings (made and had in the matter of the prisoner's petition), purporting to be signed by the officer in whose custody the same shall be, or his deputy, certifying the same to be a true copy of such petition, schedule, order, or other proceeding, and

sealed with the seal of the said Court, shall at all times be admitted in all Courts whatever, and before commissioners of bankrupt, and Justices of the Peace, as sufficient evidence of the same, without any proof whatever given of the same, further than that the same is sealed with the seal of the said Court as aforesaid.”

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Mr. Serjeant *Spankie* now applied for a rule *nisi*, that this verdict might be set aside and a new trial had. He submitted that the copy of the order of the Insolvent Debtors' Court, referring the matters of the plaintiff's petition to be heard by the Justices, at the Quarter Sessions for *Glamorganshire*, was improperly admitted in evidence; that it was necessary that the order itself should have been produced, for the purpose of establishing the plaintiff's discharge, and shewing that the Justices had jurisdiction to act under the 41st section of the statute. Although the 76th clause provides, that sealed and certified copies of the proceedings shall be sufficient evidence of such proceedings, and therefore puts a certified and sealed copy of an affidavit on the same footing as the original, yet it does not make the copy evidence of a fact of which the original itself would not be evidence; and if the original order had been produced, it would merely have shewn that the copy of the order was a true copy, and such fact could not have been proved by affidavit. Although a copy of the order, *sealed and certified*, might have sufficed, yet, no *certified* copy of the order was produced, but merely a copy of an affidavit used in the Court, verified by the officer. He did not certify the copy of the order to be a true one; nor would he, in order to make the certificate, have occasion to look at the original order, but only at the copy of the order annexed to the original affidavit. The authentication, therefore, of the copy of the order depended, not on the officer's certificate, but only upon the oath of the party, and the affidavit produced merely referred to the order; whereas, it ought to have verified the order itself, to the copy of which the seal of the Court should also have been attached. But the order should have been produced *per directum*, and the copy could only be admissible in evidence by being duly sealed with the seal of the Court. It did not even purport to be signed by the officer.

But the Court were unanimously of opinion, that the copy of the order of the Insolvent Debtors' Court was sufficiently verified by the certificate and seal on the copy of the affidavit, as the one was attached to and connected with the other.

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The learned Serjeant then contended, that, under the circumstances, the Jury were mis-directed; as the defendant's attorney stated, that he proceeded against the plaintiff without the authority of the defendant, who took no part in the proceedings; and that, as the attorney was misled by the advice of his pleader, the plaintiff could not be entitled to recover, there being nothing to shew that the defendant had acted with malice, or from a want of probable cause; neither was he, whatever might have been the conduct of his attorney, answerable in an action of this nature; for, in *Ravenga v. Mackintosh* (a), it was held to be a good defence to an action for a malicious arrest, that the defendant, when he caused the plaintiff to be arrested, acted *bonâ fide* upon the opinion of a legal adviser of competent skill and ability, and believed that he had a good cause of action against the plaintiff.

Lord Chief Justice BEST.—I am of opinion that there is no pretence for this objection. I do not say whether the doctrine of *respondeat superior* applies to this case or not. It is evident, that the act of the defendant, in causing the plaintiff to be arrested at his suit, after he had been discharged under the Insolvent Debtors' Act, was without probable cause; and there can be no doubt but that justice has been done by the finding of the Jury. This point was not raised at the trial; and, although it has been now contended, that, as, by the evidence of the defendant's attorney, the acts complain-

(a) 2 Barn. & Cress. 693.

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ed of by the plaintiff were not brought home to the defendant himself, yet he must be deemed answerable for the acts of his attorney. If the objection had been raised at the trial, we might then have thought it fit to consider whether or not the principle of *respondeat superior* applies to this species of action, as well as to trespass. For many reasons, I am inclined to think that it ought. It would be a very dangerous doctrine to hold that it did not. A wealthy individual might employ a worthless or insolvent attorney to harass another, and thus the injured party would be without redress. A plaintiff, who had been improperly or unjustly taken in execution at the suit of another, might be turned round at the trial, if we were to hold that the attorney who carried on the proceedings should alone be answerable. I think, however, that this verdict ought not to be disturbed, upon the ground that the point was not raised at the trial. The only valid defence could be, that there was no evidence of malice by the defendant; but malice may be inferred:—malice in law, means an act done wrongfully, and without reasonable or probable cause, and not, as in common parlance, an act dictated by angry feeling or vindictive motives. I am, therefore, of opinion that the defendant was liable in this action, for causing the plaintiff to be arrested and imprisoned at his suit.

Mr. Justice BURROUGH (a).—The plaintiff in this case was arrested after his discharge under the Insolvent Debtors' Act, at the suit of the defendant, and for his benefit alone. If, indeed, the attorney had instituted proceedings against the plaintiff, without any previous notice from the defendant, or solely of his own authority, he might, perhaps, have been held liable. The only distinction, as to the doctrine of *respondeat superior*, is, between civil and criminal cases. In *The King v. Huggins* (b), it was held,

(a) Mr. Justice Park was at Chambers.

(b) 2 Ld. Raym. 1574; S. C. 2 Str. 882.

that a principal shall not answer criminally for the act of his deputy, unless such act were done with his consent, or by his command. But I have never known that doctrine applied to civil suits. There, the warden of the Fleet prison was indicted for murder, for having caused the death of a prisoner in his custody, by duress; but, as a deputy had been duly appointed, it was held to discharge the principal from the duties of his office; but a superior officer must be deemed liable for his deputy in a *civil* action, if the latter is insufficient to answer in damages. Here, however, the arrest of the plaintiff must be considered as the act of the defendant, and he alone is answerable for the consequences.

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Mr. Justice GASELEE.—As the point was not raised at the trial, whether the attorney was, under the circumstances, answerable for the proceedings taken against the plaintiff, without the interference of the defendant, I am of opinion that there is no ground to disturb the verdict. If the attention of my brother *Park* had then been drawn to it, the objection might have had some weight. In the case of *Todd v. Dorwick*, which was lately tried before me, on the Western Circuit, and which was an action for maliciously taking the plaintiff in execution, it was proved that all the proceedings, subsequent to the arrest, were carried on by the attorney alone; but I thought the defendant was liable. If, indeed, an attorney act under the advice of counsel, it would be a different question. But here, for any thing that appears to the contrary, the proceedings against the plaintiff were instituted by the immediate act of the defendant himself; for, the affidavit of debt under which the plaintiff was arrested, was made by him; although it must be inferred, that he was aware that the plaintiff had previously been discharged under the Insolvent Act.

Mr. Justice PARK.—If the point now presented to the
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Court had been raised before me, at the trial, I should have left it to the Jury to say, whether the defendant was not cognizant of the plaintiff's discharge under the Act, before the proceedings were commenced against him in this suit. All the facts proved at the trial tended to shew that he was. The plaintiff had caused the defendant's name to be inserted in his schedule as a creditor, and had given him notice of his intention to take the benefit of the Act. It must, therefore, be inferred that the defendant knew of his discharge, as he did not oppose it; and the plaintiff was not arrested until twelve months afterwards. At all events, it is but reasonable to suppose that the attorney must have communicated with the defendant upon the subject of the arrest.

Rule refused.

Saturday,
 May 9th.

KNIGHT v. HUNT.

The plaintiff having refused to sign an agreement to accept from his debtor a composition of ten shillings in the pound, the brother of the latter offered to supply the plaintiff with goods to the amount of one half of his demand, on which he signed the agreement. The composition was secured by a promissory note, and the goods

having been supplied:—*Held*, that, as the stipulation with respect to the goods had been kept secret from the other creditors, it was a fraud upon them; and that the plaintiff could not recover on the note, although he was the last creditor who signed the agreement for the composition, and although the brother of the debtor offered to supply the goods at his own instance, without being requested to do so, either by the plaintiff or by the insolvent.

THIS was an action on a promissory note, dated the 1st November, 1818, by which one *William Watson*, one *Thomas Aldred*, and the defendant, jointly and severally promised to pay the plaintiff the sum of 150*l.*, on demand, with lawful interest for the same from the day of the date of the note. The declaration contained a count on the note, against the defendant, as maker, and the usual money counts.

At the trial, before Mr. Justice *Littledale*, at the last Assizes for *Hampshire*, it appeared, that, in *October*, 1818, *Watson*, one of the makers of the note, being in insolvent circumstances, made a proposal to his creditors

to compound with them at ten shillings in the pound; that *Watson* being indebted to the plaintiff in 311*l.* 5*s.*, he refused to assent to those terms, upon which *Watson's* brother, a coal merchant, went to him, and agreed to furnish him with coals to the amount of 150*l.*, if he would sign an agreement for the composition; to which the plaintiff acceded, and, on the 10th *October*, signed an agreement to take ten shillings in the pound from *Watson*, to be paid with the other creditors, the amount to be secured by bills, payable at three, six, nine, and twelve months; that the plaintiff, afterwards, *vis.* on the 20th *October*, agreed to take the promissory note in question, which the defendant signed as surety for *Watson*; and that the interest was regularly paid to the plaintiff from 1818 to 1824. It also appeared, that all *Watson's* creditors had signed the agreement for the composition before the plaintiff, but that they were not aware that any agreement had been made between him and *Watson's* brother as to the supply of the coals in question. On the latter being called as a witness, he proved that the coals had been delivered to the plaintiff on the terms above stated; when it was objected for the defendant, that, as the plaintiff had received as much as the other creditors, as the coals amounted to 150*l.*, which was one-half of the plaintiff's demand, he could not be entitled to recover against the defendant, as the agreement with the brother was a fraud on the other creditors; and that, if the plaintiff should be deemed entitled to the amount of the note, he would, in fact, receive the whole of his demand from his debtor, whereas he had agreed to take ten shillings in the pound with the other creditors.

The learned Judge left it to the Jury to say, whether the note was given to secure the payment of the composition according to the terms of the agreement, and whether the plaintiff had not received ten shillings in the pound by the supply of the coals in question. They found in the

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affirmative, and accordingly gave a verdict for the defendant.

Mr. Serjeant *Bompas* now applied for a rule *nisi*, that this verdict might be set aside, and a verdict entered for the plaintiff, for the amount of the note, or that a new trial might be had.—As the note was given by the defendant as a security for the payment of ten shillings in the pound by *Watson*, according to the terms of the agreement for the composition, the plaintiff has a right to avail himself of such security; and as he was the last creditor who signed the agreement, the others could not have been induced to add their names by following his example; and although an agreement for a particular creditor to receive more than the creditors at large, might, in some instances, be void, yet, it would not deprive such creditor of his right to enforce a security given him for the payment of the sum stipulated to be given by way of composition, according to the terms of the original agreement. Here, the debtor was not put in a worse situation by the offer made to the plaintiff by his brother, which was altogether voluntary on his part; nor could the creditors at large be injured or affected by it, as the funds to be derived from the debtor's estate would be equally available to them. At all events, it cannot be considered as a fraudulent transaction, as the insolvent was no party to it, nor did the plaintiff himself require the coals to be supplied, but they were furnished spontaneously by the brother of the debtor; and, if he had neglected to do so, the plaintiff could not have enforced his agreement, and he therefore ought not to be deprived of his remedy against his debtor; and the defendant, as his surety, must stand in the same situation as the insolvent himself. Although, in *Cockshott v. Bennett* (a)—where all the creditors of an insolvent consented to accept a composition for

(a) 2 Term Rep. 763.

their respective demands, upon an assignment of his effects by a deed of trust, to which they were all parties, and one of them, before he executed the deed, obtained from the insolvent a promissory note for the residue of his demand, by refusing to execute till such note was given—it was held, that the note was void in law, as it was a fraud upon the rest of the creditors; yet, that case is distinguishable from the present, as there the note was demanded by the creditor from his debtor, and there was evidence that other creditors had been induced by the party requiring the note, to accede to the terms of the composition. In *Steinman v. Magnus* (a)—where a debtor entered into an agreement with his creditors, by which they agreed to receive 20*l. per cent.* in satisfaction of their several demands, and released the remainder, in consideration that half of the composition should be secured by the acceptances of a third person, who was also a creditor, which security was accordingly given, and paid when due—it was held, that such agreement was binding on the plaintiff, one of the creditors, although he was the last who signed the agreement, and it did not appear that he had induced any of the other creditors, or the surety, to sign it; and that the plaintiff's suing the debtor, after having received the composition, was a fraud upon the surety and the other creditors. There, however, the party suing, and the other creditors, had undertaken to liberate the defendant, upon the terms of the agreement; and, therefore, when the security was paid, it was a fraud upon the party giving it to sue the defendant afterwards. In *Thomas v. Courtney* (b), the creditors agreed to accept from an insolvent, in full satisfaction of their debts, twelve shillings in the pound, payable by instalments; and one of the creditors, who signed for the whole amount of his debt, held at the time, as a security for part, a bill of exchange, drawn

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(a) 11 East, 390.

(b) 1 Barn. & Ald. 1.

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by the debtor and accepted by a third person; and, the sum due on the bill having been afterwards paid by the acceptor—it was held, that the creditor might retain it, the agreement of composition not containing any stipulation for giving up securities, and the effect of it not being to extinguish the original debt. The main grounds of distinction between those cases and the present, is, that the transaction as to the coals would not affect the insolvent, nor be of any detriment to his creditors, especially as they had not been induced to sign the agreement by any act of the plaintiff, nor could they have been influenced by his concurrence or assent, as he was the last person who put his signature to the agreement.

Lord Chief Justice BEST.—I am of opinion that there is not the slightest pretence for this motion. Agreements for compositions with creditors should be prepared and acted on with the strictest good faith. If a creditor agree to accept ten shillings in the pound, common honesty requires that he should have no more; and, if he sign a paper to that effect, it must be assumed that he, knowing the circumstances of his debtor, has exercised his judgment on the subject, and that he thought it was prudent for him to take what it appears upon the face of the agreement he had consented to accept. But, if he has previously entered into an agreement with another, by which he is to receive his full demand, or even more than he himself states that he was content to take, it operates as a fraud on the other creditors, who may be induced to sign the agreement, by seeing his name to it. Although, here, the plaintiff signed last, which may make this case distinguishable from those which have preceded it, yet the true principle to be deduced from all of them is, that, in the case of a composition between a debtor and his creditors, they all ought to be put in the same condition, and one ought not to be misled or deceived by another's having stated that he had

agreed to take one sum, whilst, in fact, he had privately and secretly agreed to take another. The question, then, is, whether, by what the plaintiff did in this case, before he consented to sign the agreement for the composition, the other creditors of the insolvent were fairly dealt by. It has been said, that the plaintiff was not acting dishonourably, and that the debtor was neither injured, nor the funds of his other creditors rendered less available, nor did they receive any detriment from the offer made to the plaintiff by the brother of the insolvent, which was gratuitous and uncalled for by the former. But the question is, whether the judgment of the creditors at large has not been influenced by the supposition that they were all to receive an equal proportion, to be derived from the estate of their debtor. It is a very different case, and there can be no reason to complain, or to blame a debtor, where no previous contract has been entered into, if, after having discharged his engagements under the agreement for the composition, he gratuitously pays the remainder. But, here, previously to the signing of the contract for the composition, by which the plaintiff consented to take ten shillings in the pound, to be paid with the other creditors, he had secretly agreed with the brother of his debtor to take coals from him to the amount of 150*l.*, which, coupled with the note, was sufficient to secure to him the whole of the amount of his debt. Besides, it appears that the coals were furnished to the plaintiff to the amount agreed on; and, if he had been paid more than he ought, he would have been liable to refund in an action for money had and received.

Mr. Justice PARK.—There is a wide distinction between a gratuitous gift *after* a payment made under an agreement for a composition, and a *previous* understanding that one creditor shall receive more than the others; and here, it appears, that the plaintiff refused to accede

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to the proposed composition, until the brother of the insolvent had agreed to supply him with coals to the amount of half of his demand, and which were afterwards furnished. I therefore think that the Jury have come to a right conclusion.

Mr. Justice BURROUGH.—There is no ground to induce us to disturb this verdict.

Mr. Justice GASELEE concurring—

Rule refused.

Tuesday,
May 12th.

DOE, on the joint demise of DIXON and WESTERN, v. WILLIS and Another.

Commissioners under an inclosure-act made an allotment to J. S., who, shortly afterwards, conveyed all his lands to trustees for the payment of certain debts and incumbrances:—*Held*, that the allotment passed by the conveyance, although the commissioners did not make their award until three years afterwards.

THIS was an action of ejectment. At the trial, before Mr. Baron *Vaughan*, at the last Assizes for *Buckinghamshire*, it appeared, that the lessors of the plaintiff, who were bankers, had, in and previously to the year 1821, made large advances to a person of the name of *Rose*, who was then seised in fee, of (among others) the lands and premises sought to be recovered in this action, and on which the lessors of the plaintiff had an equitable mortgage, in order to secure such advances; that, by deeds of the 25th and 26th *November*, 1824, *Rose* conveyed the premises so mortgaged to the lessors of the plaintiff, upon trust to sell, and pay, in the *first* place, certain incumbrances in the deeds specified, *secondly*, the debt due from *Rose* to the lessors of the plaintiff as mortgagees, and the remainder (if any) to *Rose*, the grantor; that an action was pending against him, at the time the deeds in question were executed, for non-payment of the sum advanced, and in which the lessors of the plaintiff were on the eve of obtaining judgment. It also appeared,

that, in the beginning of the year 1824, previously to the conveyance, the lands in question had been allotted to *Rose* under an inclosure-act, but that the award of the commissioners was not executed until *May*, 1827.

The defendants claimed under two writs of *elegit* sued out by them as creditors of *Rose* on judgments entered up on the 30th *November*, and 4th *December*, 1824, in actions commenced against *Rose* in *Hilary* Term in that year. Under these circumstances, it was contended, for the defendants—*First*, that the deeds of conveyance, under which the lessors of the plaintiff claimed, were fraudulent and void as against *Rose's* creditors, under the statute 27 *Eliz.* c. 4, as the actions on which the *elegits* were founded, were commenced by the defendants nearly a year previously to the execution of such deeds, although the judgments were not entered up until afterwards—*Secondly*, that, although the lands were allotted to *Rose* in 1824, and previously to the conveyance to the lessors of the plaintiff, yet, as the commissioners did not make their final award until 1827, the allotment did not pass under the conveyance by *Rose*.

The learned Judge left it to the Jury to say, whether the deed was fraudulent, or executed with an intent to deprive the defendants, as creditors of *Rose*, of the fruits of the judgments on which the *elegits* had been sued out. They found that there was no fraud, and accordingly gave a verdict for the lessors of the plaintiff.

Mr. Serjeant *Taddy*, on a former day in this term, applied for a rule *nisi*, that this verdict might be set aside, and a nonsuit entered, or a new trial granted, and submitted, that, under the circumstances, the deeds by which *Rose* conveyed his property to the lessors of the plaintiff were void in law, and fraudulent as against the defendants as his creditors. Whether the deeds were fraudulent or not, was rather a question of law than of fact. The lessors

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of the plaintiff were only creditors of *Rose* to a limited extent, *viz.* to the amount of the advances made by them; and, by the terms of the deeds, the defendants' right would be altogether defeated, although they were *bona fide* creditors, and had commenced actions for their demands on *Rose*, long previously to the time of the execution of those instruments; as only those persons who had a charge on the estate were to be favoured; and, if any sum remained after certain incumbrances, and the demand of the lessors of the plaintiff, were satisfied, it was to be paid to *Rose*, the grantor. The deeds were clearly covenous as against those who were not parties to, or could not claim under them; and, if there be a fraud in law, it must prevail, although the Jury may have negatived fraud in fact. The whole of the lands were conveyed to the lessors of the plaintiff. Although the defendants were judgment creditors, and entitled to receive the fruits of their judgments shortly after the deeds were executed; and, although the writs of *elegit* were not then sued out; yet, as *Rose* remained in possession of the premises, and the deeds were never acted on by the lessors of the plaintiff, they could not be entitled to recover in this action. So, although the property might have been conveyed to them, yet, as the commissioners did not make any award as to the lands allotted to *Rose*, until three years after the conveyance, the defendants were entitled to claim under the *elegits*, which operated immediately on their being issued, and which were obtained previously to the award. The right of either party could only accrue when the award was executed, and the lessors of the plaintiff could have no title to the lands allotted until then; and, as the conveyance was made with a view to defeat the claims of *Rose's* creditors, the defendants, as such, had a paramount title by virtue of the writs of *elegit*, the actions on which they were founded having been commenced long previously to the conveyance by *Rose* to the lessors of the

plaintiff. Although, by the statute 1 & 2 *Geo.* 4, c. 23, s. 2, it is enacted, that it shall be lawful for every person to whom an allotment is set out, and to whom possession has been given by virtue of any order or direction by the commissioners, to commence any action or suit at law, for any injury or damage that may be done or committed by any person to the ground or soil of any such allotment, and to bring, maintain, and prosecute any action of ejectment, for recovering the possession of any such allotment from any person, notwithstanding the award of the commissioners should not be executed and perfected by them; yet, the party to whom such allotment is made, could have no title to convey until the award was made: and here, the deeds do not mention the allotment, but only convey the lands in respect of which the allotment was made.

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The Court declined granting the rule, in the first instance, saying, that they would communicate with the learned Baron who tried the case, as to the mode in which he left the question to the Jury.

Lord Chief Justice BEST now said, that the learned Judge had stated, that the question left to the Jury was, whether *Rose* had conveyed the property in question to the lessors of the plaintiff with a fraudulent view, or to prevent his *bonâ fide* creditors from obtaining their just debts, and that the Jury had negatived all fraud. The question, therefore, was properly left to them, and set at rest by their verdict; for, in *Cadogan v. Kennett*, Lord Mansfield said (a): "The statute 27 *Eliz.* c. 4, does not go to voluntary conveyances, merely as being voluntary, but to such as are fraudulent. A fair voluntary conveyance may be good against creditors, notwithstanding its

(a) Cowp. 434.

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being voluntary. The circumstance of a man being indebted at the time of his making a voluntary conveyance, is an argument of fraud. The question, therefore, in every case is, whether the act done is a *bond fide* transaction, or whether it is a trick and contrivance to defeat creditors." Here, it is not denied that the lessors of the plaintiff were not *bond fide* creditors of *Rose*, at the time of the conveyance; and, although they were not entitled to retain the whole of the proceeds of his property for the debt due to them, yet the conveyance was good in law, as they were to hold as trustees for the other creditors, and they had an equitable mortgage on the property, which had existed three years previously to the execution of the deeds. Although it has been said, that the lands in question did not pass to the lessors of the plaintiff, by the conveyance made to them by *Rose*, as the commissioners had not made their award; yet, as the deeds conveyed the land, it of course included the allotment which had been previously made, and which was confirmed by the award.

Rule refused.

Tuesday,
May 12th.

— Demandant; — Tenant; NICHOLAS and three others, Vouchees.

Where part of the proceedings in a recovery were taken on paper in *France*, and in the *French* language, and a translation was written on parchment, and certified by a Notary here to be "a faithful translation." The Court refused to allow the recovery to pass: but *held*, that all the documents must be taken on parchment.

MR. Serjeant *Adams* moved that this recovery might pass, notwithstanding that part of the proceedings, which were taken in *France*, were written on *paper*. The documents in question were in the *French* language, and there was a translation of them written on *parchment*, and certified by a Notary Public here to be a faithful translation. It also appeared that there were two separate warrants of attorney, the one signed by *Nicholas*, the other by the other three vouchees. It was submitted, that this

was no objection to the validity of the proceedings, on the authority of the case of *Lang*, demandant; *Lee*, tenant; *Woodhouse*, vouchee (a); where, there being three vouchees, two of whom had given one joint warrant of attorney, and the other had given his on a separate piece of parchment, it was objected, that the warrant of attorney ought to have been joint, that is, all on one piece of parchment; but the Court thought that there was nothing in the objection; and Mr. Justice *Heath* said, "that the warrants would be good, even in a real suit."

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But the Court said, that the Notary should have made an affidavit that he was acquainted with both the *French* and *English* languages, as well as that the translation was a true and faithful translation of the documents of which it purported to be a copy; and that the *French* documents must be written on parchment. And they referred to the case of *Tatham*, demandant; *Baxendale*, tenant; *Tabor*, vouchee (b); where the necessary documents for taking the acknowledgment of a recovery were engrossed on parchment and sent to *Holland*, by the law of which country, all documents bearing the certificate of a *Dutch* Notary, require a *Dutch* stamp, which can only be imprinted on *Dutch* paper, and the documents were accordingly returned to this country, written on paper so stamped and certified—the Court refused to allow the recovery to pass, but enlarged the return to the *dedimus*, and permitted the writ to be re-sealed, in order that the proceedings might be properly executed on parchment—which was afterwards done.

The learned Serjeant, therefore, took nothing by his motion.

(a) 1 Bos. & Pul. 31. (b) 4 B. Moore, 481; S. C. 2 Brod. & Bing. 65.

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The defendants, merchants in London, entered into an agreement with *J. S.*, for the working of mines in Peru, for which he was to receive a certain stipulated salary, and also one-fifth share of the profits. *J. S.* was furnished by the defendants with a letter of instructions, a letter of credit enabling him to draw on them for 10,000*l.*, and a power of attorney authorizing him to enter into, transact, complete and execute, all contracts or agreements which he might deem expedient for the purpose of obtaining a grant or lease of any mine, or for the purchase of any ore, or of the right to open, dig, or work any mine; and to enter into, make, and execute any deeds, conveyances, &c., that he might deem necessary; and, generally, to do all such acts, &c., as the defendants themselves could do if personally present. *J. S.*, having already raised 10,000*l.* on the letter of credit, obtained a further sum from the plaintiffs in Peru, which he applied to the defendants' use, and drew bills on them for the amount. The letter of credit and power of attorney were not shewn to the plaintiffs by *J. S.*, when they made the advances, nor did it appear that they required to see them; neither were the plaintiffs informed by *J. S.* of his having already obtained money on the letter of credit. The defendants having refused to accept the bills:—*Held*, that the plaintiffs were entitled to recover the amount of the advances so made to *J. S.* as money had and received.

Quære:—Whether the agreement, that *J. S.* should receive a share of the profits, constituted him a partner with the defendants?

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THE plaintiffs in this action sought to recover the sum of 6,220*l.* 16*s.* 6*d.*, being the amount of nine bills of exchange, drawn by one *John Crabtree*, at Lima, in December, 1825, and January, February, and March, 1826, upon the defendants in London, payable to the plaintiffs' order, and to charge the same to *Crabtree's* account, with or without further advice. The declaration contained counts on the bills, and the usual money counts.

At the trial, before Lord Chief Justice *Best*, at *Guildhall*, at the Sittings after the last *Michaelmas* Term, it appeared, that, in the latter part of the year 1824, *Crabtree*, the drawer of the bills, was applied to by the defendants, merchants in London, to go out, as their agent, to Peru, for the purpose of entering into negotiations for the taking or working of mines, on the defendants' behalf; and that, to carry this object into effect, they entered into an agreement with *Crabtree*, and afterwards furnished him with a letter of instructions, a letter of credit, and a power of attorney, with which he proceeded on his mission to Lima, where he was well known, and had considerable credit. The agreement was as follows:—

“Memorandum of agreement between Mr. *John Crabtree*, and Messrs. *Herring, Graham, & Powles*.

“Messrs. *Herring, Graham, & Powles*, being desirous to enter into contracts for working such of the mines

in *Peru* as may offer suitable encouragement for doing so, with the view of forming an association for the subsequent performance of such contracts, it is agreed that Mr. *Crabtree* shall proceed to *Peru* by the first *Jamaica* packet, to carry this object into effect, if he shall find it practicable and expedient to do so.

" Mr. *Crabtree* shall be furnished by Messrs. *Herring, Graham, & Powles*, with their power of attorney, authorizing him to enter into such proposed contracts on their behalf, which he engages to use in conformity with the instructions he may from time to time receive from them.

" Messrs. *Herring, Graham, & Powles*, shall defray all Mr. *Crabtree's* reasonable travelling expenses, and expenses of living, during the continuance of this mission.

" Mr. *Crabtree* shall receive from Messrs. *Herring, Graham, & Powles*, for his remuneration, the sum of 1,000*l.*, and, if this mission shall occupy Mr. *Crabtree* more than a twelvemonth from the date of his leaving *London* to embark in the packet, he shall receive at the rate of 1,000*l. per annum*, from the said date.

" Mr. *Crabtree* shall further receive one-fifth share of the clear profits which Messrs. *Herring, Graham, & Powles* may make by such contracts, or by forming the association to be founded on the contracts to be entered into by him.

" *London*, 1st *January*, 1825.

" *Herring, Graham, & Powles.*

" *John Crabtree.*"

The defendants then furnished *Crabtree* with the following letter of instructions:—

London, *January* 7th, 1825.

" Dear Sir,—We have to request your attention to the following instructions on the objects of your mission to *Peru*.

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“ On your arrival in *Peru*, your first care will necessarily be, to ascertain whether the political condition of the country be so far settled as to render it prudent to undertake any extensive engagements there. We need say nothing as to the means of ascertaining this fundamental point, or the rules by which you should be governed in deciding it. You know the character of the people, and the nature of the country, and you will have the best channels of information open to you. We will only remark, that we should prefer measures being delayed so long as any serious doubts on this head may remain on your mind.

“ Presuming this point satisfactorily settled, your next object will be, to make engagements in our name, and on our behalf, for working such of the mines as, on good information, you may learn to be the most promising. Among other considerations, the following will deserve your attention, *viz.* the proximity of the mines to water communication, so as to afford convenient means of transport for steam-engines and other machinery; their being situated in a neighbourhood where fuel for steam-engines, and for smelting, is to be found, and where labourers acquainted with mining are to be had; and the salubrity of the situation, with a view to the employment of *European* miners.

“ The ways in which mines may be secured, are as follows, *viz.*—

“ *First*, by making contracts or leases with the Government, for working such as may be Government property. In this way we have engaged the *Mariquita* mines from the *Colombian* Government; a copy of the lease or contract for two of which we inclose for your government.

“ *Secondly*, by making contracts with individuals who may be proprietors of mines, on the principle of undertaking to put such mines at work, giving the proprietors a certain portion of the net produce. This portion varies according to the quality and circumstances of the mine.

In some cases, one-third, in others, half, and, in others, two thirds, being conceded to the owners. These terms apply more particularly to *Mexico*, which mines, being so much nearer to *Europe*, are necessarily much more desirable to *English* capitalists. We should think that, in no case, could any mine proprietor in *Peru*, look for more than half the net proceeds of the mine. The term of such contracts should be twenty-one years. We inclose, for your government, the copy of a contract made in *London*, for working a mine in *Mexico*, the provisions of which are considered very fair on both sides. We should recommend your taking this contract as a model in any such engagements, it having been prepared by one of the most experienced miners in *England*.

“ It is indispensable that we take the entire management of the mine; and very much for the interest of the proprietors themselves that we should do so.

“ The *third* way of securing mines is, by taking possession of such as may be liable to be denounced by having been abandoned by their former possessors. This is the most desirable way of obtaining mines, if practicable, the entire possession being thereby secured; but, some difficulty may arise, if it should happen (as is the case in some parts) that none but *citizens* can denounce mines. It will be so much the interest of the Government to draw forth the resources of the country, that every practicable facility may reasonably be anticipated from them, and perhaps, if the name of a citizen be necessary, that of General *Miller* (who is doubtless a naturalized citizen of *Peru*) may, probably, be made use of, by making an arrangement with him for that purpose. Of all this, you will be best able to judge on the spot. There is one consideration, however, we should wish you to bear in mind, on the subject of abandoned mines; and that is, that, where they have only been suspended working, by the temporary difficulties of the proprietors, occasioned by the struggle for the es-

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establishment of independence, we should by no means wish to deprive such persons of the possession of their property. We would much rather purchase their rights, either by money, or by an annual allowance, than take advantage of their misfortunes: but, where mines appear to be wholly deserted by their former proprietors, without hope of their being able to resume the working them, and, consequently, are liable to be denounced by any persons possessing competent means for working them, we see no objection to your taking measures for gaining possession of such mines, if practicable.

“ We need hardly suggest to you, that, in whatever manner you may obtain mines, whether by lease or contract, or possession, it will be very important to see a clear legal title established, that we may be going on on a secure foundation in this respect.

“ As to the locality of the mines, it is important to keep in view that the more you can meet with (if good) in one district, the better, for the greater convenience of management.

“ As it may be important to make advances to some of the mine proprietors, on the execution of the contracts with them, we inclose a letter of credit, authorizing you to draw on us for 10,000*l.*, or 50,000 dollars, to be applied to this or the other purposes of this undertaking.

“ If you succeed in making the proposed engagements for mines, you will please have them executed in four parts, and send three to us by different opportunities; the first, by Mr. *Miller*, who accompanies you, and who will, in that case, return with all possible dispatch; and the other two, by the quickest and safest occasions you can find.

“ You will, at the same time, forward to us the fullest details regarding the mines you may engage, derived from persons practically conversant with the subject, so as to enable us to judge of the description of machinery, and

other assistance necessary to be dispatched from this country, which will be immediately forwarded.

"For the purpose of enabling you to carry these instructions into effect, we inclose you our power of attorney. We remain &c.

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"*J. Crabtree, Esq.*"

The following is a copy of the letter of credit:—

"*London, January 7th, 1825.*

"Dear Sir,—We hereby authorize you to draw upon us for the sum of 10,000*l.* sterling, or 50,000 *Spanish* dollars, and we undertake to honour your drafts accordingly. We are, &c.

Herring, Graham, & Powles.

"*To J. Crabtree, Esq.*"

The following is a copy of the power of attorney referred to in the letter of instructions:—

"To all to whom these presents shall come:—We, *Charles Herring, William Graham, and John D. Powles*, of the city of *London*, merchants, send greeting:—Whereas, we contemplate entering into certain undertakings within the empire, states, territories, dominions, and dependencies of *Peru*, in *South America*, and, for carrying the same into effect, we have agreed with *John Crabtree*, of the city of *London*, gentleman, that he shall proceed to *Peru*, with such powers as are hereinafter delegated to him:—Now, know ye, and these presents witness, that we, the said *Charles Herring, William Graham, and John D. Powles*, have, and each and every of us have made, ordained, nominated, constituted, and appointed, and, in our and each of our place and stead, put and deputed, and, by these presents, do, and each and every of us do, make, ordain, nominate, constitute, and appoint, and, in our and each of our place and stead, put and depute, and by these pre-

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sents, do, and each and every of us do, make, ordain, nominate, constitute, and appoint the said *John Crabtree* to be our and each of our true and lawful attorney, for us, and each of us, and in our or each of our names or name, or in the name of our said attorney, to enter into, transact, *complete* and *execute* all such negotiations, proposals, contracts, engagements, or agreements, which our said attorney shall, in relation to the said proposed undertakings, or any of them, deem it expedient or proper to enter into, transact, complete, and execute, with the Government or Governments for the time being of the said empire, states, territories and dominions of *Peru*, and their dependencies in *South America*, or any of the ministers, officers, branches, or departments thereof respectively; or with any public or private companies, or other persons entitled to, interested in, or having the care, superintendance, management, government, agency, control, or direction, of or over any mine or mines, vein or veins of ore whatsoever, situate and being, or which may hereafter be found or discovered, or be denounced, within any part or parts of the aforesaid empire, states, territories, or dominions, and their respective dependencies, for the purpose of obtaining a grant, demise, or lease, of any such mines or veins, or of any lands or grounds over or adjoining the same, or for the *purchase of any ore or ores, or of the right to open, dig, or work any mine or mines*, or to smelt and refine the ore or ores thereof, or any other ores, or otherwise touching or concerning the management, conduct, or carrying on of the works of any such mines, or any other works or undertakings, or in, about, or relating to the same, or to the smelting and refining of the ores thereof, or any other ores; and, for the purposes and objects aforesaid, or any of them, or in relation thereto, and to the completion thereof, for us and each of us, and in our and each or either of our names, and as our and each of our acts and deeds, or in the name of our said attorney, *to enter into*,

make, sign, seal, execute, and deliver such deeds, conveyances, leases, grants, covenants, petitions, memorials, and other instruments, acts, and writings whatsoever, as in the judgment or opinion of our said attorney shall appear requisite or expedient; and also, for the purposes and objects aforesaid, or any of them, or in relation or incidental thereto, or to any of them, to take to himself, hire, engage, or employ all such engineers, surveyors, agents, collectors, clerks, artificers, artisans, workmen, and other persons, and at such salaries and rate of compensation or recompence as our said attorney shall, in his discretion, think requisite, proper, or expedient; and also for him, our said attorney, to conduct, manage, superintend, and carry on, and purchase all needful and necessary tools, implements, and materials, and erect and establish all proper and needful buildings and other works for the conducting and carrying on in a beneficial manner the works of any such mines, and the smelting and refining of any such ore or ores, through all the different processes and branches thereof, in such a manner, in all respects, as our said attorney shall think advisable and expedient for our benefit and advantage; and also for him, our said attorney, from time to time, to contract to sell, and absolutely to sell and dispose of, the produce and proceeds of any such mines or ores, or any part thereof, or barter or exchange, or deliver the same for or in lieu of any goods, wares, or merchandize, the produce of *Peru*, or otherwise, as to our said attorney shall seem meet, or convenient, or expedient; and also, in the discretion of our said attorney, to transmit to *England*, to us, or on our account, all or any part of the proceeds or produce of any such mines or ores, or of the goods, wares, or merchandize received or taken by way of barter or exchange as aforesaid, or else to sell or dispose of any such goods, wares, or merchandize so received or taken in exchange as aforesaid, and also to ask, demand, sue for, recover, and receive, of and from all and every per-

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son or persons whomsoever, liable, interested, or compellable, in that behalf, all debts, sums of money, bonds, bills, notes, securities for money, goods, chattels, or effects, which, in the prosecution of the said undertakings, or any of them, or in relation to the purposes and objects aforesaid, or arising out of the same, shall become due, owing, payable, or deliverable, or of right shall belong to us, or any or either of us; and, upon receipt or delivery thereof respectively, or of any part thereof, to make, sign, seal, execute, and deliver, good and sufficient receipts, releases, acquittances, and other discharges for the same; and also, if necessary, to compound any debts, sums of money, claims, and demands, so due and owing, and to become due and owing to us, or any or either of us, and to take less than the whole in full for the same, or to extend the time of payment thereof, or the delivery of any goods or effects, and to accept security for the same respectively, or any part thereof; and also, to adjust, settle, and allow, or to disallow, any accounts which may subsist between us or any other person or persons, or between our said attorney, or any other person or persons, in respect or in any way relating to such mines or ores, or the working, smelting, or refining thereof, or to the proceeds or produce thereof, or to any goods or effects, bartered, sold, or exchanged, as aforesaid, or to any of the purposes or objects aforesaid, or to any other matter, cause, or thing relating thereto, or arising out of the same respectively, wherein we may in any manner be interested or concerned; and, for all or any of the purposes or objects aforesaid, or relating thereto, for us and in our and each or either of our names or name, and as our and each of our act and deed, or in the name of our said attorney, to sign, seal, execute, and deliver any deed of composition or release, or other deeds, bonds of arbitration, or other bonds, agreements, instruments, assignments, assurances, and other acts whatsoever, as there may be occasion, in the

judgment or opinion of our said attorney; and, accordingly, to perform and carry into full effect, any covenant, engagement, or liability, in such deeds or other instruments or assurances to be contained, on our parts or behalves, or on the part of our said attorney; and also, in manner aforesaid, or otherwise, to commence, sue forth, and prosecute, any action, suits, processes, or other proceedings whatsoever, according to the laws of the country, which it may be necessary or expedient, in the judgment or opinion of our said attorney, to commence, sue forth, and prosecute, in and about, and for the purpose of carrying into effect, all or any of the purposes or objects hereinbefore mentioned, and the powers and authorities herein contained; and, if he shall think it proper or expedient, to discontinue or become nonsuit in any such action, suits, or proceedings; and also to defend any action, suits, and proceedings which may be instituted against us, any, or either of us, or against our said attorney, on our, any or either of our accounts, in relation to the premises; and, for or about or respecting any of the purposes or objects aforesaid, to appear in or before any courts, tribunals, judges, ministers, or officers whatsoever, when and as there may be occasion, and there to make such protests, appeals, and declarations, and to take, adopt, and pursue all such other proceedings as our interest may from time to time require, and as to our said attorney shall seem requisite and expedient; and, generally, for the purposes aforesaid, or any of them, or otherwise in relation to the premises, to transact, negotiate, manage, execute, and perform all such acts, deeds, matters, and things whatsoever, as to our said attorney shall, in his judgment and opinion, seem meet or expedient to be done or performed, in and about all and singular the premises aforesaid; *and that as fully, extensively, and effectually, in all respects, and to all intents and purposes whatsoever, as we ourselves could do, perform, or act in the same, if we were personally present and acting there-*

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in: and we do hereby give and grant unto our said attorney, full power and authority from time to time to nominate, substitute, and appoint one or more attorney or attornies under him, to act in and about all or any of the purposes or objects aforesaid; and such substituted attorney or attornies at pleasure to dismiss from time to time; and, notwithstanding the substitution of any other attorney or attornies as aforesaid, to exercise and perform all or any of the powers and authorities hereinbefore expressed and contained, and given to him: and we do hereby give and grant unto our said attorney, and his substitute and substitutes, to be appointed from time to time, our full and whole power and authority over the premises: and we do hereby promise and agree to ratify and confirm and allow all and whatsoever our said attorney and such substitute or substitutes, shall lawfully do or cause to be done, in and about the premises; under and by virtue of these presents. In witness whereof, we have hereunto set our hands and seals, at *London*, the 8th day of *January*, 1825.

“ *Charles Herring.*

“ *William Graham.*

“ *John D. Powles.*”

The defendants having refused to accept or pay either of these bills so drawn on them by *Crabtree*, and the plaintiffs having made advances to him, as their agent, to the amount of such bills, commenced the present action; and, on *Crabtree* being called as a witness, he stated, that he arrived at *Lima* in *May*, 1825; that he obtained more than 10,000*l.* there, on the defendant's letter of credit; that he afterwards procured from the plaintiffs, at various times, the amount for which the bills in question were drawn; that he applied it, as it was wanted, towards the purchasing and working of mines, and other general purposes, on the defendants' account; that he told the

plaintiffs that he had authority from the defendants to draw upon them, but that he did not shew them the letter of credit; that there were no indorsements upon it that he had received sums advanced by others; and that he did not know whether the plaintiffs were aware that any previous advances had been made on the faith of that letter; that he could not recollect whether he had shewn the plaintiffs the power of attorney or not, but that he had shewn it to others; that the letter of instructions and the letter of credit were kept separate from the power; and that the plaintiffs might have seen all the documents if they had pleased.

The Lord Chief Justice reserved the construction to be put on the power, for the consideration of the Court, and left it to the Jury to say, whether, by the usual course or practice of merchants, the plaintiffs should have asked to see the power and letter of credit, before they made the advances to *Crabtree*—whether they had in fact done so, or whether they had seen either of them—and whether, if they had been acquainted with the terms of the letter of credit, they were aware that advances had been made upon it by others, before *Crabtree* applied to them.

The Jury returned a verdict, in writing, in the terms following:—

First, that it was the duty of the plaintiffs to call for and examine the power of attorney and letter of credit. *Secondly*, that there was no evidence that the plaintiffs did or did not ask for or see those documents. And, *Thirdly*, that there was no evidence that the plaintiffs had any information that any money had been previously advanced by others under the letter of credit; and they found a verdict for the plaintiff for 1,520*l.* 16*s.* 6*d.*, the amount of two of the bills, which *Crabtree* stated he had specifically applied to the defendants' use, before he left *Lima*, and which were drawn for the working of mines, within the terms of the power.

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Mr. Serjeant *Wilde*, in the last term, obtained a rule *nisi*, that this verdict might be set aside, and a verdict entered for the defendants instead thereof, or that a non-suit might be entered, on the grounds, that the plaintiffs were not authorized in making the advances to *Crabtree*, so as to charge the defendants in this action, as it was the plaintiffs' duty to inquire for and inspect the letter of credit and power of attorney, previously to making such advances; that, if they had seen either the one or the other, they would have ascertained that the former only authorized him to draw to the extent of 10,000*l.*, and that the latter only empowered him to obtain leases of mines, and superintend the working of them, but not to raise money for those purposes; and that, at all events, he could only draw bills to the amount of 10,000*l.*, the sum limited by the letter of credit, and which he admitted he had done before he made any application to the plaintiffs for the advances in question.

Mr. Serjeant *Taddy* now shewed cause.—This case involves a difficult question of commercial law. It is most important to consider the situation in which *Crabtree* stood with regard to the defendants, independently of the power of attorney; for he was clothed with extensive rights beyond the terms of that instrument, which, however, was framed in the largest possible words. Under the agreement, *Crabtree* became a partner with the defendants, as far as regarded the world at large. Although it is not unusual for mercantile men to allow their agents or clerks to receive a proportion of profits, without constituting them partners; yet, here, *Crabtree* was not only to receive a specific salary, *viz.* at the rate of 1,000*l.* a-year, as a remuneration for his services as clerk, but he was further to receive one-fifth share of the clear profits which the defendants might make by contracts to be entered into by him. Where a party receives an indefinite share of pro-

fits, he clearly becomes a partner. In *Waugh v. Carver*, Lord Chief Justice *Eyre* said (a): "Upon the authority of *Grace v. Smith* (b), he who takes a moiety of all the profits indefinitely, shall, by operation of law, be made liable to losses, if losses arise;—upon the principle, that, by taking a part of the profits, he takes from the creditors a part of that fund which is the proper security to them for the payment of their debts." And, in conclusion, his Lordship said, with regard to the case before him, that, "though, with respect to each other, the parties were not to be considered as partners, yet they had made themselves such, with regard to their transactions with the rest of the world." That doctrine has been confirmed in many subsequent cases. In *Hesketh v. Blanchard*, Lord *Ellenborough* said (c): "The distinction taken in *Waugh v. Carver*, applies to this case. Quoad third persons, it was a partnership; for, the plaintiff was to share half the profits. But, as between themselves, it was only an agreement for so much, as a compensation for the plaintiff's trouble." As far, therefore, as regarded third persons abroad, *Crabtree* had not only a right to draw bills on the defendants, but to make engagements for them to any extent, as he was, in fact, a partner by the terms of the agreement. But, if he were not a partner, he was vested with far larger rights by the terms of the power, under which he was authorized to transact, *complete*, and execute all negotiations and contracts for the purpose of obtaining *grants* or leases of mines, or for the purchase of ore, or of the right to open or work any mines. It must, therefore, be assumed, that he had a right to purchase or contract for lands for those purposes. Inasmuch, therefore, as the defendants refused to accept the bills drawn on them by *Crabtree*, the plaintiffs were entitled to recover the money they advanced to him, as the partner of

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(a) 2 Hen. Blac. 247. (b) 2 Sir Wm. Blac. 998. (c) 4 East, 147.

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the defendants, by the terms of the agreement, or, as their accredited and unlimited agent, by virtue of the power: and, as the plaintiffs made the advances without any consideration from the defendants, they are entitled to recover on the count for money had and received.

Mr. Serjeant *Russell*, (who was with Mr. Serjeant *Taddy*), was stopped by the Court, who called on—

Mr. Serjeant *Wilde*, and Mr. Serjeant *Stephen* (who was with him), in support of the rule.—The main question is, what was the actual authority given by the defendants to *Crabtree*, so as to render them chargeable to the plaintiffs for the costs incurred in the negotiating for and working of mines in *South America*. As the power of attorney did not give him any authority to raise money, such authority cannot be implied; and although *Crabtree* himself might be liable, he could not bind the defendants. The letter of credit restrained or limited the general terms of the power, and the actual authority can only be ascertained from all the documents taken together. The Jury have found that it was the duty of the plaintiffs to have called for the letter of credit, as well as the power of attorney; and the effect of those instruments, coupled with the letter of instructions, is, that *Crabtree* was not authorized to purchase mines, but only to take them on lease. The power did not authorize him to raise money, and yet the plaintiffs made the advances in question without inquiring whether he had an express or implied authority, or even as to the nature of the instructions he had received from the defendants. Admitting that he was authorized to purchase mines, it does not follow that he was to draw on his principals to an unlimited extent for that purpose; and, if he had confined himself to the working of them, the sum to which he was restricted by the letter of credit would have been amply sufficient. It is an established principle,

that it is the duty of every person who makes advances to an agent, or deals with him as such, to look at the nature of his authority; and, if he makes a mistake as to its extent, it is at his own peril. In *De Bouchot v. Goldsmid*, Lord Loughborough said (a), "I take it not merely to be a principle of the law of *England*, but by the civil law, that, if a person is acting *ex mandato*, those dealing with him must look to his mandate." Now, here, the letter of credit accompanied the power, and were both referred to in the letter of instructions, in which they were inclosed. The question, therefore, is, whether, on the construction of these three instruments, taken together, *Crabtree* was authorized to raise money for any other purpose than the taking of mines under contracts or leases, and the working such mines:—or beyond the extent of 10,000*l*. He clearly was not, for the word '*grant*,' must be taken with reference to those with which it is accompanied: *noscitur a sociis*; and, in the former part of the power, it is connected with the words "demise or lease;" and, although *Crabtree* was afterwards authorized to enter into and execute such deeds, conveyances, leases, *grants*, covenants, and other instruments, as in his judgment should appear requisite, for the purposes mentioned in the power; yet, all those instruments must be confined to the taking of mines under demises or leases, as that was the subject matter of the power, and the only object the defendants had in view. If the power alone had been exhibited to the plaintiffs, without either of the other documents, there might have been a doubt as to its construction; but, as neither of them were shewn, the only question is, whether *Crabtree* had an authority, as between himself and his employers, to raise money to an unlimited extent; and, although the power might contain general terms, yet it was controlled by the letter of credit, which limited *Crabtree's* authority to draw

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(a) 5 Ves. 213.

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bills on the defendants to the extent of 10,000*l.* only, which would have been sufficient to procure leases and carry on the working of the mines. But the power must be construed strictly, and it does not authorize *Crabtree* to raise money beyond the object of his mission, or for any other purpose whatever. In *Attwood v. Munnings* (a), a person who carried on business in this country, went abroad, and gave certain persons here two powers of attorney—the *first* authorizing them to do certain specific acts for him and in his name, and to his use, and, (among others), to indorse bills, and generally to act for him as he might do if he were present—and, by the *second*, authority was given them, for him and on his behalf, to accept bills drawn on him by his agents or correspondents, as occasion should require. One of the persons to whom the power was given having accepted a bill, in the name of the party abroad, *by procuration*, in an action against the latter by the indorsee of the bill, it was held, that the right of such indorsee depended upon the authority given to the attorney; and that the general words in the power were not to be construed at large, but, as giving general powers for the carrying into effect the special purposes for which they were given; and Mr. Justice *Bayley* said: “It would be dangerous to hold, that the plaintiff was not bound to inquire into the propriety of accepting. He might easily have done so, by calling for the letter of advice; and I think he was bound to do so.” So, here, it was the duty of the plaintiffs to have called for the power of attorney and letter of credit, under which alone *Crabtree* could be authorized to require advances to be made to him; and the Jury have so found. In *Hogg v. Snaith* (b), it was held, that an attorney, under a general power to receive, recover, obtain, compound, and discharge demands due to his principal, did not authorize the attorney to negotiate bills, or to indorse them.

(a) 7 Burn. & Cress. 278; S. C. 1 Man. & Ryl. 66. (b) 1 Taunt. 347.

in his own name. So, in *Hay v. Goldsmidt* (a), the Court were of opinion that a power to *transact all business*, did not authorize the attorney to indorse bills; and they said, that the largest powers must be construed with reference to the subject matter. Applying that principle to the present case, the object of the power was, to authorize *Crabtree* to take leases of mines, and dig for ore, and to execute contracts and other instruments for carrying those purposes into effect. But he was not to plunge his principals in debt, by the purchase of mines; as it was not incidental to the purposes of his mission, or mentioned in his letter of instructions. But the letter of credit gave sufficient information as to the extent of *Crabtree's* authority to draw on the defendants; and, although the plaintiffs were not informed that money had been raised upon it by others previously to them, and that the sums advanced had not been indorsed upon it, yet, if the plaintiffs had inquired for it, *Crabtree* would naturally have told them of such advances, and a parol representation would have been equal to a written indorsement. But, as the plaintiffs did not require the inspection of either of the documents under which *Crabtree's* authority was derived, they must suffer for their own neglect.

But it has been said, that, as *Crabtree* was to receive a certain proportion of the profits, independently of his salary, he thereby became a partner with the defendants. But, until the mines were actually contracted for and worked, he could only be considered as their agent, and the money in question was advanced to him as such. He drew bills on the defendants as his principals, and the credit was given to them individually. Besides, by the letter of credit, it is quite clear, that *Crabtree* was only to draw in his character of agent; and, his participating in the profits to be made by the contracts entered into by him, could

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(a) 1 Taunt. 349, n.

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only be made available after they were completed and carried into effect. In *Shirreff v. Wilkes* (a), it was held, that two of three partners who had contracted a debt prior to the admission of a third partner into the firm, could not bind him without his assent, by accepting a bill drawn by a creditor upon the firm in their joint names, as such security was fraudulent and void as against the third partner. So, here, the defendants could not have bound *Crabtree* as a partner, until he was entitled to receive his proportion from the mines, after the contracts were made. In *Saville v. Robertson* (b), it was held, that a partner, not originally liable, could not be charged by afterwards acknowledging himself to be responsible, or even by accepting bills drawn on the firm as partners. In *Young v. Hunter* (c), where a party purchased goods for exportation, and permitted another to become partner in the adventure, it was held, that the latter did not thereby become liable to the vendor for the price of the goods; and, in *Meyer v. Sharpe* (d), it was decided, that an agent who is paid a proportion out of the profits of an adventure, does not thereby become a partner. Here, however, *Crabtree* acted only as an agent, having a limited authority; and, as he exceeded it, and the plaintiffs made no inquiries respecting it, they cannot be entitled to recover as against the defendants, who were fully justified in refusing to accept the bills in question; nor could the advances made by the plaintiffs to *Crabtree* be considered as money had and received by the defendants to the plaintiffs' use.

Lord Chief Justice BEST.—At the trial, I thought that this was not a case of partnership, but that it ranged within that class of cases in which a servant or agent receiving a certain *per centage* upon the profits, has been decided not to create a partnership. It is not necessary now to

(a) 1 East, 48.

(b) 4 Term Rep. 720.

(c) 4 Taunt. 582.

(d) 5 Taunt. 74.

consider whether or not the view I then took was correct. The inclination of my opinion is, that it was. I do not, however, decide this case upon that point, but upon the supposition that *Crabtree* was an agent of the defendants in this particular transaction. There is no ground for the alarm which it has been feared will be felt by the commercial world; for, this is not a commercial transaction. I might probably have abstained from submitting to the Jury all the questions I did; but I left it to them, in terms, to say, whether or not the plaintiffs, who advanced the money sought to be recovered in this action, ought to have looked at the authority of *Crabtree*, the person receiving it. They found that it was the duty of the plaintiffs to inquire for the power of attorney and the letter of credit; thereby negating the necessity of their calling for the letter of instructions—and I think they found wisely, for, the instructions might contain matters which it would not be proper to divulge. All that it was necessary for the plaintiffs to inquire into, was, the authority of the agent, and that would sufficiently appear from the letter of credit, and the power of attorney under which he acted. If, therefore, these two instruments do not constitute a sufficient authority from the defendants to *Crabtree* to act as he has done, in drawing for and receiving money on their account, the plaintiffs cannot recover. The Jury found (a most material fact) that the plaintiffs had no information of any money having been before advanced to *Crabtree* by other persons, under the letter of credit. Therefore, coupling the letter of credit and power of attorney with that fact, I am of opinion, that he had sufficient authority to raise the money in question; for, if the plaintiffs had looked at either of these instruments, they would have been satisfied that he had such authority. I admit the principle, that authorities of this nature must be construed strictly; and that, although there may be general words in a power, they cannot extend the authority beyond the clear mean-

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ing of the parties, or the object they have in view. Let us then look at the object of this power of attorney, as well as the terms of the letter of credit, and see whether those two instruments, taken together, are not sufficient to confer on *Crabtree* an authority to raise or borrow money, for carrying into effect the purposes of his mission. I should be extremely sorry, if a foreigner, who had made advances upon the faith of such instruments, should be told that he ought to have taken the opinion of some *English* lawyer before he parted with his money. Such a person could only be guided by common sense; and, looking at this power of attorney, a person of plain and ordinary understanding could entertain no doubt. The language is as comprehensive as can well be conceived. It commences by reciting "that the defendants contemplated entering into certain undertakings within the empire, states, territories, dominions, and dependencies of *Peru*, and, for carrying the same into effect, had agreed with *Crabtree*, that he should proceed to *Peru*, with such powers as were thereafter delegated to him:" and then proceeds thus—"Now we do make, ordain, nominate, constitute, and appoint, him, *Crabtree*, to be our and each of our true and lawful attorney, for us, and each of us, and in our or each of our names or name, or in the name of our said attorney, to enter into, transact, *complete* and *execute* all such negotiations, proposals, contracts, engagements, or agreements, which our said attorney shall, in relation to the said proposals, undertakings, or any of them, deem it expedient or proper to enter into, transact, complete and execute, with the government or governments for the time being, of the said empire, &c., &c., of *Peru*, and their dependencies, in *South America*, or any of the ministers, officers, branches, or departments thereof respectively, or with any public or private companies, or other persons entitled to, interested in, or having the care, superintendence, management, government, agency, control, or direc-

plaintiffs that he had authority from the defendants to draw upon them, but that he did not shew them the letter of credit; that there were no indorsements upon it that he had received sums advanced by others; and that he did not know whether the plaintiffs were aware that any previous advances had been made on the faith of that letter; that he could not recollect whether he had shewn the plaintiffs the power of attorney or not, but that he had shewn it to others; that the letter of instructions and the letter of credit were kept separate from the power; and that the plaintiffs might have seen all the documents if they had pleased.

The Lord Chief Justice reserved the construction to be put on the power, for the consideration of the Court, and left it to the Jury to say, whether, by the usual course or practice of merchants, the plaintiffs should have asked to see the power and letter of credit, before they made the advances to *Crabtree*—whether they had in fact done so, or whether they had seen either of them—and whether, if they had been acquainted with the terms of the letter of credit, they were aware that advances had been made upon it by others, before *Crabtree* applied to them.

The Jury returned a verdict, in writing, in the terms following:—

First, that it was the duty of the plaintiffs to call for and examine the power of attorney and letter of credit. *Secondly*, that there was no evidence that the plaintiffs did or did not ask for or see those documents. And, *Thirdly*, that there was no evidence that the plaintiffs had any information that any money had been previously advanced by others under the letter of credit; and they found a verdict for the plaintiff for 1,520*l.* 16*s.* 6*d.*, the amount of two of the bills, which *Crabtree* stated he had specifically applied to the defendants' use, before he left *Lima*, and which were drawn for the working of mines, within the terms of the power.

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been introduced. Unless, therefore, *Crabtree* was authorized to raise money, the objects of the power could not have been fulfilled. But it has been said, that there is a letter of credit, by which *Crabtree* was restricted from drawing on the defendants for a larger sum than 10,000*l.*; and that, without it, he would not have been authorized to raise any money whatever. If, indeed, this had been a letter of credit in the usual terms, the case might have been different. In *Beawes's Lex Mercatoria* (a), the form of a letter of credit is given, and is what I have always understood it to be. It is there said (b): "These letters are of two sorts, *viz.* general and special, and both given to furnish travelling persons with cash as their occasions may require; they are commonly open or unsealed, and contain an order from the writer to his correspondent or correspondents, to furnish the bearer with a certain sum, or an unlimited one; and the difference between them is, that the former is directed to the writer's friends at all the places where the traveller may come (though it is not customary to give separate letters to each place), and the other directed to some particular one; obliging himself for the re-payment of whatever monies shall be advanced in compliance with the credit given, on producing a receipt or a bill of exchange, which he thinks proper to have, from the person credited." If the defendants had attended to that distinction, no difficulty would have arisen. But even commercial men could not form an idea of such a letter of credit as this. It is a letter addressed to *Crabtree* himself; whereas, it ought to have been addressed to those who were to make the advances. If men will be foolish enough to sign such instruments, and put them into the hands of others, authorizing them to draw for large sums, they must meet the consequences. The Jury have found that the plaintiffs did not know, nor was there any evidence to shew that they had been informed, that any money had been previously advanced by others under this.

(a) 6th Edit., by Chitty, Vol. 1, p. 607.

(b) Id. 606.

letter of credit. If it had been shewn to any person in *South America*, he would have been induced to make advances to *Crabtree*, to the amount of 10,000*l.*, on the credit of the defendants, his principals in this country, if he did not know that that sum had already been raised; and his being the agent of the defendants, and empowered to act for them under the general purposes of his mission, was fortified by the power of attorney. If any fraud had been practised upon the defendants, it was incumbent on them to shew it. This decision will produce no ill effect on commercial credit; it will merely tend to compel speculators to be more cautious as to the agents they employ abroad, in transactions of this nature. If they do not select persons of honesty and integrity, foreigners ought not to suffer; but the consequences should fall on those who repose confidence in agents who are not worthy to be trusted. For these reasons, I am of opinion that this rule should be discharged.

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Mr. Justice PARK.—I fully concur in the opinion expressed by my Lord Chief Justice. I also admit, that, in our Courts of law, powers of attorney must be construed strictly; but foreigners, or persons inhabiting distant countries, cannot be presumed to have any knowledge of our technical legal rules. I agree with the decision of the Court of *King's Bench*, in *Attwood v. Munnings*, which is confirmatory of the view we take in the present case. There, the principal gave two powers of attorney to his agent, by the former of which, authority was given him to indorse bills, and to do certain other specified acts, for his principal, and in his name, and to his use; and, by the latter, the agent was authorized to accept, for his principal, and in his name, bills drawn or charged on him by his agents or correspondents: and the Court held, that the special power to accept extended only to bills drawn by an agent in that capacity, and that the general words in both powers were not to be construed at large, but as giving general powers for carrying into effect the

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special purposes for which they were given. There, a bill had been drawn on the agent by a partner of the principal, which the agent accepted, in the name of his principal, *by procuration*, and which was indorsed by the drawer to the plaintiffs. Mr. Justice *Holroyd* said (a): "The powers in question did not authorize this acceptance. The word *procuration* gave due notice to the plaintiffs, and they were bound to ascertain, before they took the bill, that the acceptance was agreeable to the authority given. Then, as to the general powers. These instruments do not give general powers, speaking at large, but only when they are necessary to carry the purposes of the special powers into effect. The power to indorse was exclusive of the power to accept, which was confined to bills to be drawn by the agents or correspondents of the principal, and not to be extended to his partners." *Expressio unius est exclusio alterius*. And Mr. Justice *Littledale* said: "The first power of attorney contains an authority to indorse, but not to accept bills; the latter, therefore, seems to have been purposely omitted. Neither is this varied by the general words, for they cannot apply to any thing as to which limited powers are given." But, who can look at the power of attorney in this case, without being satisfied that it conferred on *Crabtree* an ample authority to do every act necessary to the acquiring of mines for his principals, and completing the purpose for which he was sent out to *Peru*. I strongly incline to think that he was a partner; but I give no opinion on this point. If the raising money and drawing bills were necessary for the purpose of his mission, he clearly had authority to do so, by virtue of the power: for, it authorized him "to enter into, transact, *complete* and *execute* all such negotiations, contracts, or agreements, which he might deem it expedient to enter into, for the purpose of obtaining a grant, demise, or lease, of any mine, or of any lands over or adjoining the same, or for the purchase of any ore, or of the right to open, dig, or work

(a) 7 Barn. & Cress. 284.

any mine or mines." Now, he could only *complete* such engagements, by making purchases on the one hand, and paying for them on the other. The power to purchase ore, and the *right to work* any mine, authorizes him to purchase, as well as to take on lease: "And, for all or any of the purposes or objects aforesaid, and to the completion thereof, he was to enter into, make, sign, seal, execute, and deliver, such deeds, conveyances, leases, grants, covenants, petitions, memorials, and other instruments, acts, and writings whatsoever", and, "generally, to transact, negotiate, manage, execute, and perform, all such acts, deeds, matters, and things, as should, in his judgment and opinion, seem meet and expedient; and that as fully, extensively, and effectually, in all respects, and to all intents and purposes whatsoever, as they, the defendants, themselves could do, perform, or act in the same, if they had been personally present and acting therein." The powers, therefore, were as wide and extensive as language could make them; and, it is not to be said, that the general expressions are mere verbiage. We shall violate no principle of law, by holding that *Crabtree* had authority to act as he did. I agree with my Lord Chief Justice, in saying, that the letter of credit was not strictly an instrument of that description, for the reasons which he has stated; but, *Crabtree* could not carry into effect the object his principals had in view, without drawing bills, or raising monies for the purposes he was entrusted to perform.

Mr. Justice BURROUGH.—I am clearly of opinion that this verdict ought not to be disturbed. The distinction between a general and a special power of attorney, is this:—the former must be construed according to the subject-matter and the general purposes for which it is given; the latter must be governed by its own special provisions. The power in question relates to a speculation of vast magnitude, to be carried on in a distant part of the world, and cannot be assimilated to an ordinary

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mercantile transaction. Large sums would be required for purchasing ore and working the mines; and *Crabtree* was clearly authorized to raise money for the defendants' use. They meant to arm him with a distinct power, independently of the letter of credit; and the general power, being by deed, cannot be restrained by that letter. Besides, if he were limited to draw for 10,000*l.* only, the enterprize might have failed altogether. He was authorized to purchase ore, as well as to open, dig, or work any mine. These objects could not have been accomplished for so small a sum as that mentioned in the letter of credit. I do not admit that there was not a partnership between *Crabtree* and the defendants, but it is not necessary to decide that point.

Mr. Justice GASELEE.—I concur with the rest of the Court in thinking that this verdict ought not to be disturbed. I was at first strongly inclined to think that this was a case of partnership, but my opinion on that point has been somewhat shaken by the argument in support of the rule, and the cases to which we have been referred. But, upon the best consideration that I have been able to give the question, I think that the better course is, to pursue that adopted by the Court, although I have some difficulties on the subject. The Jury have found that it was the duty of the plaintiffs to call on *Crabtree* to shew them the letter of credit and power of attorney under which he acted, before they made the advances in question; and he said that the power was kept separate from the other papers, and would have been shewn to them if they had required it. It is but fair to presume that the plaintiffs saw the power before they advanced the money. *Crabtree* only stated, that he did not recollect whether he had shewn it to them or not. With respect to the letter of credit, if the plaintiffs had seen it, they could not have ascertained, on the face of it, whether any previous advances had been made to *Crabtree* under it. If they were bound to make any inquir-

ies as to that fact, of whom were they to inquire? *Crabtree* would, of course, make no disclosures that were calculated to defeat the object he had in view. It was, therefore, his interest to conceal the fact that any previous advances had been made to him; and, for any thing that appears to the contrary, he might have raised the money before he got to *Lima*; for, the letter is not addressed to any merchants there, but to *Crabtree* himself, authorizing him to draw on the defendants for 10,000*l.*, without stating for what purpose; and they undertook to honour his drafts accordingly. In the absence, therefore, of any indorsements of the sums advanced previously to those advances made by the plaintiffs, if they had seen the letter of credit, they would have been warranted in making them.

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Rule discharged (a).

(a) Upon all the authorities, the better opinion seems to be, that the terms of the agreement constituted *Crabtree* a partner with the defendants. Lord *Eldon* said, in *Ex parte Hamper* (17 Ves. 412), "It is clearly settled, though I regret it, that, if a man stipulates, that, as the reward of his labour, he shall have, not a specific interest in the business, but a given sum of money, even in proportion to a given *quantum* of the profits, that will not make him a partner; but, if he agrees for a part of the profits, as such, giving

him a right to an account, though having no property in the capital, he is, as to third persons, a partner:" and, in *Ex parte Rowlandson*, his Lordship said (1 Rose's Bankruptcy Cases, 91), "that it was settled, that, if a man, as a reward for his labour, chooses to stipulate for an interest in the profits of a business, instead of a certain sum proportioned to those profits, he is, as to third persons, a partner, and no arrangement between the parties themselves could prevent it."

COE and Another v. CLAY.

THIS was an action of *assumpsit* for the breach of a special agreement. The declaration stated, that the defend-

Tuesday,
May 12th,

The defendant,
by an agreement containing words of present demise, let

to the plaintiffs certain lands and premises which the party in possession refused to quit. In *assumpsit* against the defendant, for a breach of the agreement, in not delivering possession to the plaintiffs:—*Held*, that the defendant was bound to give possession, as a contract to do so must be implied; and that the plaintiffs were not obliged to bring ejectment against the wrongful occupier.



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ant, on &c., at &c., agreed to let certain lands and premises to the plaintiffs, for the term of seven years from the date of the agreement, at the yearly rent of 80*l.*, payable half-yearly; that it was further agreed, that the plaintiffs should pay all taxes, &c.; and that, if either party should run back from the terms of the agreement, he should forfeit 10*l.* Breach, that the defendant did not let the plaintiffs into possession of the premises.

At the trial, before Mr. Baron *Vaughan*, at the last Assizes at *Cambridge*, the plaintiffs put in the agreement, by which it appeared, that the defendant had *agreed to let* the premises to them on the terms stated in the declaration. It was also proved, that the plaintiffs could not obtain possession according to the terms of the agreement, as a party already in occupation of the premises refused to quit: whereupon the present action was brought.

For the defendant, it was objected, that this was no evidence of a breach of the agreement on his part; and that, as it contained words of actual and *present demise*, and was not a contract for a *future lease*, the plaintiffs had mistaken their remedy, they having a sufficient interest to maintain ejectment against the person in possession.

A verdict was taken for the plaintiffs—damages 10*l.*; leave being reserved to the defendant to move to set it aside and enter a nonsuit, in case the Court should be of opinion that the action was not maintainable.

Mr. Serjeant *Peake* now applied for a rule *nisi*.—The plaintiffs adduced no evidence of a breach of the agreement on the part of the defendant; nor did they prove that he did any act subsequent to the letting, to amount to such breach. Admitting, that, if a person being *in possession* of land, let it by words of present demise to another, and then refuse to give up the possession, he would be liable to an action; yet here, the defendant had not

the possession, but only the right of possession, as he had parted with all his interest. The plaintiffs' remedy was by an action of ejectment against the then occupier, who wrongfully held over against them and against his landlord.

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Lord Chief Justice BENT.—I think there is no pretence for this motion. The agreement upon which the action was brought, has been truly said to contain words of present demise. What does a man who enters into an agreement to let premises to another, bind himself to do? To give him possession, and not to give to the party to whom he demises a mere right to obtain possession from a wrongdoer, by an action of ejectment. The breach alleged in the declaration is, that the defendant did not let the plaintiffs into possession, according to the terms of the agreement. He certainly was bound to do so; and it was proved that he did not. That was sufficient to sustain the verdict.

The rest of the Court concurring—

Rule refused.

DOE, on the demise of the Reverend EDWARD SOUTHOUSE,
Clerk, v. JENKINS and WOODHOUSE.

Friday,
May 15th.

THIS was an action of ejectment, brought to recover two undivided third parts of certain messuages, vaults,

Devise "to the testator's sons, Thomas and Samuel, and their heirs

males, then to the testator's four grandsons, share and share all alike, then to the heirs males of all his said grandsons, and then to go to his grandsons' heirs males, that part that belonged to their father, and then to them, and then to the last liver, to their heirs males of his said grandsons; and, for want of issue males of his grandsons, to the testator's nephew, and his heirs males, &c.; and, for want of such issue male, to the testator's own right heirs for ever."—*Held*, that the testator did not intend that any part of his property should go over, until all the issue of his grandsons was extinct; and, therefore, that cross-remainders might be implied.

Receipt by an heir in tail, for ten years, of rent reserved in a lease for ninety-nine years granted by his ancestor, a former tenant in tail—*Held*, to be a confirmation of the lease.

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yards, and premises, in *Southouse-court*, otherwise *Edward's-court*, in the parish of *St. Martin* in the Fields, in the county of *Middlesex*.

The cause came on to be tried, before Mr. Justice *Burrough*, at the Sittings at *Westminster*, after the last *Trinity* Term, when a verdict was found for the lessor of the plaintiff, subject to the opinion of the Court upon the following case:—

“ *Henry Southouse*, being seised in fee (*inter alia*) of the freehold part of a messuage in the *Strand*, in the county of *Middlesex*, then called the *Sun Tavern* (whereof the messuages and premises in question, or the land on which the same are situate, were at that time parcel), by his last will and testament, bearing date the 3rd *November*, 1743, and properly executed and attested so as to pass real estates, after devising to his son *Thomas Southouse*, certain lands and tenements not in question in this cause, proceeded to devise as follows:—‘ I give and devise to my said son *Thomas Southouse*, lately in the possession of *Watkins*, or Mrs. *May*, now Mrs. *Hayes*, the *Sun Tavern*, in the *Strand*, in the parish of *St. Martin* in the Fields, in the county of *Middlesex*, for and during his natural life. I do give and devise to my said son *Thomas Southouse*, all those two farms, &c., at *Ravensdon*, in *Bedfordshire*, for and during his natural life; but, whosoever shall be in possession of the said lands at *Ravensdon*, and all the afore-said premises, so given by me to my said son *Thomas Southouse*, I charge on it a rent or an annuity of 40*l. per annum*, to be paid to my daughter *Ann Pellatt*, for and during her natural life; and an annuity of 40*l. per annum*, to be paid to my daughter *Elizabeth Parker*, for and during her natural life.’ And, in another part of the said will, as follows: ‘ And, from and after the decease of the said *Thomas Southouse*, I give and devise the said farms, &c., at *Ravensdon*, &c., and my houses in the occupation of the late *Watkins*, and Mrs. *May*, now Mrs. *Hayes*, to

the first son of the body of the said *Thomas Southouse*, lawfully begotten, and the heirs male of the body of such first son lawfully issuing; and, for default of such issue, to the second, third, and fourth, and all and every other the son and sons of the body of my said son *Thomas Southouse*, severally and successively, and in remainder, one after another, as they and every of them shall be in seniority of age and priority of birth, and the several heirs male of the body and bodies of all and every such son and sons lawfully issuing; the elder of such sons, and the heirs male of his body issuing, being always preferred and to take before the younger of such sons and the heirs males of his and their body and bodies issuing. I give and devise part of the said messuage and premises unto my son *Samuel Southouse*, for his life, and to his heirs males of his body, after the decease of my son *Thomas Southouse*, and his heirs males, *viz.* my farms at *Upminster*, &c., and the *Sun Tavern*, late *Mrs. Hayes'*, in the *Strand*, in *St. Martin's* in the Fields; and, for want of issue males of my son *Thomas*, and my son *Samuel Southouse*, after their decease, I give the aforesaid farm at *Upminster*, &c.; and the *Sun Tavern*, I give and devise to my son *Edward's* four sons, to *Henry Southouse*, to *Edward Southouse*, to *Thomas Southouse*, and to *William Southouse*, my four grandsons. And I do further give to my four grandsons as above, after the decease of my son *Thomas Southouse*, and his heirs males, all my farms, &c., at *Ravensdon*, in *Bedfordshire*; and I do hereby order to be paid out of the premises as is before given to my son *Samuel Southouse*, and his heirs males, and also my four above grandsons, out of their premises, in proportion to the value of the several rents, to pay certain annuities mentioned in the will; and then, after the decease of my son *Thomas Southouse*, and his heirs males, and after the decease of my son *Samuel Southouse*, and his heirs males, then I give all the above said farms and premises and messuages to

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my above said four grandsons, they to have share and share all alike, of all the aforesaid premises; and then I give to the heirs males of all my said grandsons, and then to go to my grandsons' heirs males, that part that belonged to their father, and then to them, and then to the last liver, to their heirs males of my said grandsons; and, for want of issue males of my grandsons, I give my grandson *Henry Southouse*, son of my son *Henry Southouse*, and to his heirs males of his body lawfully to be begotten; and, for default of such issue male, to my nephew *William Southouse*, and his heirs males, and to my nephew *Samuel Southouse*, and his heirs males, and to my grandson *Edward Parker*, his heirs males; and, for want of such issue male, I will that the same remain to my own right heirs for ever.'

" The testator, from the time of making his said will, until and at the time of his decease, remained seised as aforesaid of the said freehold part of the *Sun Tavern*, and died in or about *March, 1744*, being survived by his said sons *Thomas* and *Samuel*, and by his four grandsons, *Henry, Edward, Thomas, and William*.

" In or about the year 1779, *Thomas*, one of the said four grandsons of the testator, died, leaving no issue male.

" In or about the same year, *William*, another of the said grandsons, died, leaving issue male of his body lawfully begotten, only two sons, *Edward*, and *John Carr*.

" In 1789, the said *Thomas* and *Samuel*, sons of the testator, were both deceased, without issue male.

" On the 29th *September, 1790*, by indenture of that date, between *Edward Southouse*, one of the said grandsons of the testator, and *Charles Southouse*, eldest son lawfully begotten of the last mentioned *Edward* (and described as his eldest son and heir in the said indenture), of the one part, and the said *Edward Southouse*, son of the said *William Southouse*, deceased, of the other part—the said parties of the first part did demise unto the

said party of the second part, one undivided third part or share of the freehold part of the *Sun Tavern*, being the same messuage or tenement in the said will described as the *Sun Tavern* (then in the occupation of the said lessee, or his under-tenants)—To hold the same unto the said lessee, from the day of the date of the indenture, for the term of ninety-nine years thence next ensuing—yielding and paying unto the said lessor *Edward*, and his assigns, during his natural life, and, after his decease, to the said lessor *Charles*, his heirs or assigns, the yearly rent of 9*l*.

“ On the same 29th day of *September*, 1790, by indenture of the same date, between *Henry Southouse*, another of the said grandsons of the testator, and *Edmund Edward Southouse*, eldest son lawfully begotten of the said last mentioned *Henry* (and described as his eldest son and heir in the said last mentioned indenture), of the one part, and the said *Edward* (lessee in the first mentioned indenture), of the other part, the said parties of the first part did demise unto the said party of the second part, one other undivided third part or share of the said freehold part of the *Sun Tavern*, then in the occupation of the said lessee, or his under-tenants; to hold the same unto the said lessee, from the day of the date of the said last mentioned indenture, for the term of ninety-nine years thence next—yielding and paying unto the said lessor *Henry*, and his assigns, during his natural life, and, after his decease, to the said lessor *Edmund Edward*, his heirs or assigns, the yearly rent of 6*l*. 13*s*. 4*d*.

“ Counter-parts of the said leases were also duly executed and delivered to the respective lessors, and produced in evidence at the trial, on the part of the lessor of the plaintiff.

“ On the 5th *August*, 1791, the lessors in the indenture first mentioned, by their writing obligatory of that date, became jointly and severally bound to the lessee in that indenture, in the penal sum of 200*l*.; and, after recit-

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ing, that the obligor *Edward Southouse* was entitled to the said premises by that indenture demised, for the term of his natural life only; and the said obligor *Charles Southouse* was entitled thereto, as tenant in tail, after the decease of his father; and they being desirous of saving the expense of a recovery, and that the said recited lease might be fully performed, for and during the term aforesaid, by such person or persons as should take the inheritance of the said premises in remainder; and, to the end and purpose that the said lease might continue and be in force for the term aforesaid, the said obligors had agreed to enter into the said bond—the condition of that obligation was declared to be, that, if the said *Edward* and *Charles*, the obligors, or either of them, their or either of their heirs, executors, or administrators, should perform the agreements in the said first mentioned indenture on the part of the lessors, their heirs and assigns, then the obligation should be void.

“ On the 5th *August*, 1791, the lessors in the indenture secondly mentioned, executed to the said lessee a writing obligatory of this date, and to the like effect, in respect of the premises by them demised as aforesaid.

“ In 1793, the said *Henry Southouse*, grandson of the testator, and lessor in the said indenture secondly mentioned, died, and was survived by the said *Edmund Edward*, his co-lessor, and only issue male.

“ In 1794, the said *Charles Southouse*, lessor in the said first mentioned indenture, died without issue.

“ In 1799, the said *Edward Southouse*, lessee in the said indentures, and his said brother, *John Carr*, were both deceased, without issue.

“ In *September*, 1810, the said *Edward Southouse*, grandson of the testator, and lessor in the said first mentioned indenture, died, and was survived by *Edward*, the lessor of the plaintiff, his son and heir-at-law.

“ In *February*, 1812, the said *Edmund Edward*, lessor

in the said indenture secondly mentioned, died without issue.

“ The defendant *Jenkins* claimed possession of the said demised premises, as assignee of the estate and interest of the said *Edward Southouse*, lessee under the said leases of 1790; and the defendant *Woodhouse* claimed possession of the same, as assignee of a lease granted by the said last-mentioned *Edward*, in *March*, 1795, purporting to be a demise of the freehold part of The *Sun Tavern*, for sixty years from *Christmas*, 1794.

“ On the 28th *May*, 1817, the lessor of the plaintiff wrote and sent a letter to one *Thomas Roe*, demanding rent; in answer to which, he received a letter written and addressed to him by *Roe*, then acting as the attorney for the defendant *Jenkins*, in whom the estate and interest of the said *Edward Southouse*, the lessee, were then vested; of which last-mentioned letter the following is a copy:—

“ ‘ *Howard Street, Strand*, 31st *May*, 1817.

“ ‘ Sir,—Your letter of the 28th instant reached me in due course, and I have sent to Messrs. *Robarts & Co.* to pay the money, but a demur arises respecting the receipt which I wish to have and they decline giving, apprehending some penalty will be incurred, which I cannot think is the case. The difficulty may, however, be obviated, by your sending, through the *Cheltenham Bank*, a receipt from yourself, to be delivered to me upon payment of the money. I am merely an agent, and therefore wish to have a regular voucher.

“ ‘ The leases under which the rents are payable, bear date the 29th *September*, 1790. By the one, a rent of 9*l.* is reserved to *Edward Southouse*, for his life, and, after his decease, to *Charles*, his son, his heirs or assigns; by the other lease, a rent of 6*l.* 13*s.* 4*d.* is reserved to *Henry Southouse*, for his life, with remainder to *Edmund Edward Southouse*, his heirs or assigns.

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“ ‘As to the first rent, you, I understand, are the youngest of the three sons of *Edward*, named *Charles*, *George*, and yourself. *Charles* died in the life-time of his father, leaving *George* and yourself; whereupon *George* became heir-at-law to *Charles*.

“ ‘*George* also died in the life-time of his father (he, *George*, being, as well as *Charles*, a bachelor); whereupon you became heir of *George*, who was heir of *Charles*. There was also another brother, *Henry*, younger than yourself.

“ ‘*Edmund Edward Southouse* died in 1813, a bachelor; whereupon the property would, as I am informed, devolve to the family of your father, *Edward*, and, consequently, to you—if a recollection which occurs to me, of having formerly understood that *Edmund Edward* had a sister, be erroneous; or, it may be that she died in his life-time, and without children.

“ ‘My first traced descent proceeds upon the idea that both *Charles* and *George* died intestate, and without issue; and the second, that *Edmund Edward* so likewise died; and, further, that he left neither brother nor sister, nor any child of such.

“ ‘I shall feel obliged by your informing me whether my conclusions be correct, or in what manner you are (which I have no doubt is as represented) entitled to *6l. 13s. 4d.* If you will please so to do, and forward the receipts, in any manner, to Messrs. *Robarts & Co.*, I will call there and exchange money for them. I am, &c.

“ ‘*Thomas Roe.*’

“ ‘To the Rev. *E. Southouse*, &c. &c.’

“ ‘In this letter, the said *Thomas Roe* inclosed and sent to the lessor of the plaintiff the form of a receipt, of which the following is a copy:—

“ ‘Received of *Anthony Jenkins*, Esq., by the payment

of *T. Roe*, the sum of 7*l.* 16*s.* 8*d.*, for half a year's rent, due at *Lady-day* last, as reserved by two separate indentures of lease, each dated 29th *September*, 1790, the one reserving a yearly rent of 9*l.*, and the other, of 6*l.* 13*s.* 4*d.*; each being for premises described as one undivided third part of the freehold part of The *Sun* Tavern, in the parish of *St. Martin* in the Fields, in the county of *Middlesex*.

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“ The lessor of the plaintiff, from the date of Mr. *Roe's* letter, till the giving of the notices hereinafter mentioned, received from time to time from the defendant *Jenkins*, the several rents reserved by the said several indentures of 1790; and, after receiving the said letter from the said *Thomas Roe*, gave receipts for the said rents according to the form inclosed in that letter; the first of those receipts being for the whole rent that had become due since the title of the lessor of the plaintiff accrued.

“ On the 23rd *March*, 1827, the lessor of the plaintiff gave the defendant *Jenkins* notices, in due form, to quit the several premises demised by the said two several indentures of 1790 respectively.

“ The defendant *Jenkins* having refused to comply with such notices, the lessor of the plaintiff, after the expiration of the periods in such notices limited, served the declaration in this action in *April*, 1828, containing a demise by the lessor of the plaintiff, on the 2nd *April*, 1828, with notice to the tenants to appear in *Easter* Term following; and, in that term, the defendants, having obtained leave to defend as landlords, entered into the usual rule to confess lease, entry, and ouster.

“ The Jury found that the lessor of the plaintiff had established his title; but that he had, by his acts, confirmed the said leases of 1790.”

“ The question for the opinion of the Court was—Whether the lessor of the plaintiff was entitled to maintain this

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ejectment for the said two undivided third parts of the premises in question, or for either of them.

“ If the Court should be of opinion that he was entitled to maintain the same, for both, or for either of them, the verdict was to stand for the lessor of the plaintiff accordingly. But, if the Court should be of opinion that he was not entitled to maintain the same for either, then a non-suit was to be entered.”

The case now came on for argument, when—

Mr. Serjeant *Stephen*, for the lessor of the plaintiff, submitted, that he was entitled to maintain this action for two undivided third parts of the premises in question. It is necessary, in the first place, to consider the effect of the devise by *Henry Southouse*, and what interest passed to the devisees under his will. It was evidently his intention that his four grandsons should take as tenants in common, in tail male, with cross-remainders between them. The lessor of the plaintiff, therefore, is entitled to one undivided third as issue in tail of the testator's grandson *Edward*, and one other undivided third as remainder-man in tail, under the will; to which last share he was entitled at all events, as the lease for ninety-nine years, by *Henry Southouse*, his uncle, the preceding tenant in tail, was absolutely void as against a remainder-man, and incapable of confirmation in point of law; and, although the lease as to the other third, which the lessor of the plaintiff claimed as issue in tail, was voidable only, and capable of confirmation by him, yet, he never confirmed it, because he was ignorant of his title when he gave the receipts for the rent, on which alone the Jury could find that he had confirmed that lease; for, in *Jenkins d. Yate v. Church*, where a tenant for life made a lease for twenty-one years, and died before the expiration of the term, and the remainder-man in tail suffered the tenant to remain in possession four or five years, received the rent

regularly during that time, and then gave him notice to quit, and brought an ejectment, Lord *Mansfield* said (a): "This is a void lease, and not voidable only. But, if it were *merely voidable*, the acceptance of rent alone, unaccompanied with any other circumstances, is not a sufficient confirmation. It cannot be a confirmation, unless done with a knowledge of the title at the time." So, in *Doe d. Simpson v. Butcher* (b), it was held, that a lease, void against a remainder-man, could not be set up by his acceptance of rent, and suffering the tenant to make improvements, after his interest became vested in possession; and Lord *Mansfield* said, that "there did not appear to have been any intention, either to confirm the old lease, or to grant a new one. Both parties had proceeded under a mistake, and had supposed the original lease to be good." So, here, the rent was received by the lessor of the plaintiff through mistake; and, although no direct fraud can be imputed to the party paying it, or his attorney, yet, it was paid in consequence of a false representation made by the latter, and, although the plaintiff accepted the rent, it cannot, under these circumstances, amount to a confirmation of the lease.

With respect to cross-remainders being created between the testator's four grandsons, although a difficulty may arise on the exuberance of diction in his will, yet, the maxim applies that *utile per inutile non vitiatur*; and the obvious intention of the testator, to be collected from the whole of the will is, to establish cross-remainders to his grandsons, who took the estate as tenants in common in tail. The devise is, in terms, to the testator's four grandsons, and their heirs male, and to the last liver, and, for want of issue male of his grandsons, then over. It must, therefore, be inferred, that the testator did not mean that any part of his property should go over, till the complete failure of issue of all his grandsons.

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(a) Cowp. 483.

(b) 1 Doug. 50.

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In *Doe d. Gorges v. Webb* (a), it was held, that cross-remainders may be implied in a devise, and that no technical words are requisite, but that it is sufficient that the intention be made apparent, when such remainders may be implied to any extent. That case confirmed the doctrine laid down in *Watson v. Foxon* (b), where it was held, that cross-remainders might be implied amongst any number, although the testator had given the estates to the respective heirs of their bodies, the Court considering the word *respective* to be immaterial, and Mr. Justice *Chambre* said (c): "The oldest case is that in *Dyer* (d), and there no difficulty was found in giving cross remainders by implication among five." In *Cooper v. Jones* (e), the Court held that cross-remainders could not be raised by implication, because there was *no devise over*: whilst, here, the testator did not mean that his estate should go over till all the issue of his grandsons was extinct; and Mr. (now Lord Chief) Justice *Best* there said (f): "In all the cases, it is the language of the devise over on which the Courts have relied. Here, there is no such devise in the will." In *Holmes v. Meynel* (g), where a testator gave all his lands to his two daughters, and their heirs, equally to be divided between them, and, in case they should happen to die without issue, then over—it was held, that the daughters took estates tail, with cross-remainders. So, in *Wright v. Holford* (h), a devise to all and every the daughter and daughters of the body of *P. H.*, and to the heirs of her and their body and bodies, such daughters, if more than one, to take as tenants in common, and not as joint-tenants, and, for default of such issue, to the right heirs of the deviser—it was held, that, as nothing was given to the heir, whilst any of the daughters or their issue continued, they must, among

(a) 1 Taunt. 234.
 (b) 2 East, 36.
 (c) 1 Taunt. 239.
 (d) Page, 303 b.

(e) 3 Barn. & Ald. 425.
 (f) Id. 429.
 (g) Sir T. Raym. 452.
 (h) Cowp. 31.

themselves, take cross-remainders. And, in *Atherton v. Pye* (a), a devise to all and every the daughter and daughters of *B.*, and the heirs male of such daughter or daughters, equally between them, if more than one, as tenants in common, and, for default of *such* issue, then over—it was held, that the daughters of *B.* took cross-remainders; and, in a note by Mr. Serjeant *Williams*, to the case of *Cook v. Gerrard* (b), it appears to be quite clear that cross-remainders may be implied, if it appear to be the intention of the testator to create them, by any expressions to be found in his will.

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Mr. Serjeant *Wilde*, for the defendant *Woodhouse*, and Mr. Serjeant *Adams*, for the defendant *Jenkins*.—It must be admitted, that the lessor of the plaintiff is entitled to recover that third part of the property which he claims to take as remainder-man in tail after the death of his uncle *Henry*, provided cross-remainders can be implied between the testator's four grandsons, as the lease by the preceding tenant in tail was void as against him as remainder-man in tail after the death of the grantor. But, with respect to the other third which he claims as issue in tail, he cannot be entitled to it, as the Jury have expressly found that he had, by his acts, confirmed the lease granted by his father, the former tenant in tail. That the lease was capable of confirmation, is a mixed question of law and of fact; and the Jury were fully warranted in coming to the conclusion they did, as the lessor of the plaintiff had received the rent reserved by that lease, from *May* 1817, to *March* 1827; and it would be too much to say that he received it for so long a period in ignorance of his title; and it is manifest that a lease by a tenant in tail, not warranted by the statute 32 *Henry* 8, and which is *merely* voida-

(a) 4 Term Rep. 710.

(b) 1 Wms. Saund. 185, n. (6).

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ble, may, after his death, be confirmed by his issue in tail (a). With respect to the question as to whether cross-remainders between the grandsons may be implied, all the cases on the subject are collected in the last edition of *Powell on Devises* (b), and the conclusions drawn from them are (c), that "under a devise to several persons in tail, being tenants in common, with a limitation over *in default of such issue*, cross-remainders are to be implied between the several devisees in tail; and that this rule applies, whether the devise be to two or a larger number, though it be made to them '*respectively*,' and though, in the devise over, the devisor have not used the words, 'the said premises,' or 'all the premises,' or 'the same,' or any other expression denoting that the ulterior devise was to comprise the entire property, and not undivided shares." Admitting that to be a general principle, yet the Court can only be guided by the intention of the testator, which must be collected from the particular expressions used in his will; and the difficulty has always been to determine, whether the words, "*in default of such issue*," or other expressions which are ordinarily used to connect the devise in question with the succeeding limitation, demonstrate such an intention; and here no such intention can be implied. The testator's grandsons were not the primary objects of his bounty; but he has made an arbitrary disposition of his property among certain branches of his family. But there are words in the will which control the supposed intention of raising cross-remainders between the grandsons, as he has expressly devised to them that part which belonged to their father; by which it must be inferred that he meant to exclude the part that belonged to an uncle; and, in *Cooper v. Jones*, Lord Chief Justice Abbott said (d): "It is admitted, that no case can be cited,

(a) See Co. Lit. 45 b.—Cruise's pp. 604, *et seq.*

Digest, 3rd Edit. Vol. 4, p. 75.

(c) Id. 623.

(b) 3rd Edit. by Jarman, Vol. 2,

(d) 3 Barn. & Ald. 428.

in which the Courts have defeated the claim of the heir-at-law, unless there are words in the will by which the testator has clearly indicated his intention that the heir-at-law should take nothing until the happening of some particular event;" and here, the testator has expressed no intent from which cross-remainders can be implied; as it does not appear that he meant that the whole of his estate was to go over together upon the failure of issue of his four grandsons, or that the ulterior devise was to comprise the entire property and not undivided shares.

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Lord Chief Justice BEST.—This is an action of ejectment, in which the lessor of the plaintiff seeks to recover two undivided third parts of a messuage called the *Sun Tavern*, of which the testator, *Henry Southouse*, under whose will the plaintiff claims, was seised in fee. *Edward*, the grandson of the testator, and the father of the lessor of the plaintiff, being seised in tail of one undivided third part of the premises in question, in 1790, granted a lease of his share for ninety-nine years; and *Henry*, the uncle of the plaintiff, being also seised in tail of another undivided third part, in the same year, granted a lease of his share for a like term. The interest in the premises demised by the father, descended to the lessor of the plaintiff, as his heir in tail; and, therefore, the lease so granted by him was not absolutely void, but voidable only, and was capable of confirmation by the plaintiff after his father's death, and whether he confirmed it or not, was a question of fact; and the Jury have found that he did, and I think they could not have done otherwise. But it has been said, that the lessor of the plaintiff received the rents in ignorance of his title; but no title-deeds or other documents were withheld from him, or kept back by the defendants, and the plaintiff had all the means of informing himself of the nature of his interest in the premises; and, as he omitted to do so, but laid by and received the rent

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for ten years, he ought not now to be allowed to take advantage of his own neglect. With respect to the other third, which the plaintiff claims as remainder-man in tail, it has been admitted that the lease by his uncle *Henry*, the preceding tenant in tail, was altogether void as against the plaintiff, provided cross-remainders can be implied between the grandsons, as devisees in tail, from the intention of the testator as expressed in his will. It is in vain to attempt to make sense of nonsense, and a part of the will is altogether so unintelligible, that it is impossible to put any reasonable construction upon it, or to give it any legal meaning; but, I think enough may be collected from it, to shew that the testator did not intend that any part of his property should go over, until the entire failure of issue of his four grandsons; and the question in the argument has been most properly confined to the single ground of intention. According to former cases, the Courts decided against cross-remainders, where the word *respective* was introduced in the will; but, a different rule was established in *Watson v. Foxon*, and *Doe v. Webb*, where both the Court of *King's Bench* and this Court disregarded that word, and held it to be immaterial. So, where a testator uses any expression to denote that the ulterior devise over is to comprise the entire property, and not undivided shares, cross-remainders are implied, in order to effectuate that intent. It appears to me that the only mode by which this case can be decided on its true ground, will be, by saying that the testator meant that no interest in any part of his property should go over to a subsequent taker, until the issue of his four grandsons was completely extinct. After the death of his two sons and their heirs male, he gives the premises to his four grandsons, share and share alike, and to all their heirs male. Under this part of the will, the grandsons took as tenants in common in tail. But the testator then proceeds thus—“and then to go to my grandsons' heirs males, that part that belonged to their father; and then to *them*, and then

to the last liver, to their heirs males of my said grandsons; and, *for want of issues males of my grandsons*, I give my grandson *Henry Southouse*, son of my son *Henry Southouse*, and to his heirs male of his body lawfully to be begotten." Although the words, *to them, and then to the last liver*, are altogether unintelligible, yet the testator meant that the estate was not to go over, unless there was a failure of issue male of his grandsons; from which it must be taken, that, if either of them had male issue, such issue would be entitled to take. The estate was not to pass to the heir-at-law, till all the male issue of the four grandsons had failed, of whom the lessor of the plaintiff is one; and, if the heir-at-law is to be excluded, so must the son of the testator's son *Henry*, until the male issue of the four grandsons was extinct.

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Mr. Justice PARK.—This will is filled with a mass of unintelligible trash, but the question as to its construction has been most properly confined to the intention of the testator, to be collected from the whole of the instrument. It must be assumed that the lessor of the plaintiff was cognizant of his title, from the length of time which elapsed between the receipt of *Roe's* letter and the notice to quit. If the property was valuable, which it probably is, he would, of course, make inquiries as to his title; but he actually received the rent reserved under the lease granted by his father, for ten years, and this must be taken to amount to a confirmation of that lease. He, therefore, cannot be entitled to recover that part of the property, viz. the undivided third he claims by virtue of that demise. As to whether cross-remainders can be implied, the language of the devise over is the material thing to be looked at. The principle has been long admitted, that, whenever land is given to several persons in tail, as tenants in common, and it appears to be the intention of the testator that it is not to go over until the failure of issue of all the tenants in

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common, they will take cross-remainders in tail among themselves; and, in *Doe v. Webb*, the objections formerly founded on the number of the devisees, and the word *respective*, occurred, and were held not to avail so as to vary the construction of the will. But there are words enough in this will, for us to infer that the testator intended to create cross-remainders between the devisees in tail. In *Cooper v. Jones*, there was no devise over. The testator left a farm to his two youngest sons equally between them, share and share alike, and *entailed it on their male heirs being born in wedlock*; and Lord Chief Justice *Abbott* said, that the latter words only enlarged the previous estate for life into an estate tail; but that they left the question untouched, as to the tenancy in common; and Mr. Justice *Bayley* said: "The usual ground on which the Courts of Justice have relied for raising cross-remainders by implication, is, the language used in the limitation over;" and my Lord Chief Justice *Best* said: "In all the cases, it is the language of the devise over on which the Courts have relied; and here there is no such devise in the will."

Mr. Justice BURROUGH.—I gave no opinion at the trial, as to the effect or construction to be put on this will. I agree with the Court in thinking that there is sufficient to shew that the testator intended that cross-remainders were to be created between his grandsons, who took as tenants in common in tail. I left it to the Jury to say, whether the lessor of the plaintiff had confirmed the lease granted by his father. It was proved that he had received the rents for ten years after his death, without attempting to set up his title; and I therefore think, that the Jury came to a right conclusion.

Mr. Justice GASELEE concurred.

Postea to the lessor of the plaintiff,
as to one third.

BRITTEN and two Others v. HUGHES.

1829.

Friday,
May 16th.

THIS was an action on a bill of exchange, for 400*l.*, dated on the 1st *August*, 1825, and drawn by the defendant upon one *James Murphy*, payable nine months after date to the defendant's order, in *London*, and indorsed by the defendant to Messrs. *Sard & Smither*, who indorsed it to the plaintiffs.

At the trial, before Lord Chief Justice *Best*, at *Guildhall*, at the Sittings after the last *Michaelmas* Term, the plaintiffs proved the hand-writing of the different parties to the bill; that it was presented to *Murphy*, the acceptor, for payment, on the 4th *May*, 1826, the day it became due, and that it was dishonoured, of which the defendant had notice on the following day; that the bill was indorsed by *Sard & Smither* to the plaintiffs, on the 6th *December*, 1825; that the defendant afterwards became embarrassed in his circumstances, and in *May*, 1826, entered into a composition with his creditors, for the payment of ten shillings in the pound; that, at the time this composition was entered into, the plaintiffs held the bill in question, and another for 156*l.* 19*s.* 10*d.*, drawn by the defendant upon and accepted by one *Dauncey*; that the defendant, on applying to the plaintiffs to accept the composition, informed them that *Murphy*, if sued, would pay his acceptance in full, and therefore that it would be unnecessary for the defendant to pay them a composition on that bill; that, upon this representation, the plaintiffs agreed to execute a general release, in conjunction with certain other creditors of the defendant, on having composition notes on *Dauncey's* bill alone.

For the defendant, the following deed of composition and release was produced:—

as drawer:—*Held*, that they were not entitled to recover, as the concealment of a part of their debt was a fraud on the rest of the creditors; and that the general words of the release were not restrained by a previous recital in the deed, that the defendant was indebted to his creditors in the several sums set opposite to their names in the schedule.

The plaintiffs, together with several creditors of the defendant, executed a composition deed, by which they consented to take ten shillings in the pound, in full for their respective debts. The amount of the sums due to the several creditors was inserted opposite to their respective names, in a schedule at the foot of the deed. The deed contained a general release of the defendant by all the creditors who had signed. The plaintiffs were the holders of two bills of exchange, drawn by the defendant, and overdue when they signed the deed, and they, at the request of the defendant, only inserted the amount of one of them in the schedule, as he said the plaintiffs might recover the amount of the other from the acceptor; but the latter having refused payment, the plaintiffs sued the defendant

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“ To all to whom these presents shall come—We, whose names, hands, and seals, are hereunto set, subscribed, and affixed, creditors respectively of *Henry Hughes*, of &c., severally send greeting—Whereas the said *Henry Hughes* is and stands justly indebted unto us, his said creditors, in the several sums of money mentioned and set forth in the first column of figures set opposite to our respective names in the schedule hereunder written; and whereas the said *Henry Hughes*, by reason of various losses and misfortunes in trade, is rendered unable to pay his said creditors the full amount of their *said several debts*, and has therefore proposed and agreed to pay, and we, his said several creditors, have agreed to accept and take, a composition of 10*s.* in the pound, upon the amount of, and in full for, our respective debts, by five instalments, payable respectively at the times and in the proportions following: that is to say, 3*s.* in the pound at four months, 2*s.* in the pound at eight months, 2*s.* in the pound at twelve months, 1*s.* 6*d.* in the pound at fifteen months, and 1*s.* 6*d.* in the pound, residue of the said composition, at eighteen months, after date; the first four of the said payments to be secured by the promissory notes of the said *Henry Hughes*, and the last of the said payments to be guaranteed or secured by bills or promissory notes to be drawn or accepted, as to one half part in amount, by *G. M.*, and, as to the other half part, by *W. G.*: and, upon receipt of such bills and notes, we, the said several creditors, have agreed to execute to the said *Henry Hughes*, such general release as is hereinafter contained:—Now know ye, that we, the said several creditors of the said *Henry Hughes*, in pursuance and in performance of the said recited agreement by us and on our parts, and in consideration of the said composition or sum of 10*s.* in the pound *upon and in respect of our said several debts*, claims, and demands, upon or against the said *Henry Hughes*, secured to be paid unto us respectively in man-

ner aforesaid, have, and each and every of us hath, for and on behalf of ourselves and our several and respective partners, remised, released, and for ever quitted claim and discharged, and, by these presents, do, and each and every of us doth, remise, release, and for ever quit claim, and discharge, unto the said *Henry Hughes*, his heirs, executors, and administrators, all and all manner of action and actions, suit and suits, cause and causes of action and suits, accounts, reckonings, *bills, notes*, sum and sums of money, and securities for money, controversies, damages, claims, and demands whatsoever, which we, the said several creditors of the said *Henry Hughes*, or any or either of us, ever had, or now have, or which we, or any or either of us, or any or either of our respective heirs, executors, &c., can, shall, or may have, sue for, claim, challenge, or demand, of, from, or against the said *Henry Hughes*, for or on account of any debt, claim, or demand, of us, or any or either of us, *in respect of any security*, account, or reckoning, *now standing and being between us*, or any or either of us, or any part or parts thereof, with or against the said *Henry Hughes*, or for or on account of any other matter, cause, or thing whatsoever, from the beginning of the world to the day of the date of these presents (save and except the said bills of exchange and promissory notes for securing the payment of the said composition as aforesaid). In witness whereof, we have hereto set our hands and seals the 10th day of *May*, 1829."

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The amount of the plaintiffs' demand was inserted in the schedule, as follows:—

Names of Creditors.	Amount of Debts.	Amount of Composition.
Britten, Wilson, & Meek.	156 <i>l.</i> 19 <i>s.</i> 10 <i>d.</i>	78 <i>l.</i> 9 <i>s.</i> 11 <i>d.</i>

The other creditors were not aware that the plaintiffs

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held the bill in question at the time the above deed was executed; and it was contended, for the defendant, that it was an answer to the action; and the case of *Holmer v. Viner* (a) was relied on, to shew, that, where a party has several demands, on different accounts, against a person who becomes insolvent, and he consents to execute a deed of composition, he cannot be allowed to split his demand, and, by proving only part under the deed of composition, to sue for the remainder at a subsequent time.

For the plaintiffs, the case of *Payler v. Homersham* (b) was relied on, to shew, that the general words of the release contained in the deed were restrained by the recital, that the defendant was indebted to the creditors in the several sums mentioned and set forth in the first column of figures set opposite to their respective names in the schedule thereunder written; and that the plaintiffs did not release any greater sum than that so set opposite their names.

The Lord Chief Justice, however, was of opinion, on the authority of *Holmer v. Viner*, that the plaintiffs could not split or sever their demand, and that it was, in point of law, a fraud upon the other creditors, who might have been led to suppose that the plaintiffs had, under the terms of the deed, engaged to receive a composition upon the whole of their claims, when, in point of fact, they were receiving it only on a part; and he accordingly directed a nonsuit, reserving to the plaintiffs leave to move to set it aside, and that a verdict might be entered for them, in case the Court should be of opinion that the plaintiffs were, under the circumstances, entitled to recover the amount of the bill in question.

Mr. Serjeant *Taddy*, in the last Term, accordingly obtained a rule *nisi*, on the ground, that the plaintiffs had

(a) 1 Esp. Rep. 131.

(b) 4 Mau. & Selw. 423.

been guilty of no fraud in law, as they only intended to compound for the amount of the bill drawn by the defendant on *Dauncey*, on the belief that the bill in question would be paid by *Murphy*, the acceptor; and, therefore, they had not included it in the schedule. They only meant that the release should operate in discharge of the amount of the sum mentioned in that schedule, and not to all the demands they might have on the defendant independently of that debt. The bill in question must be considered as an *ultra* or private security, for which the plaintiffs had a remedy against a third party at the time the deed was executed, and for which the defendant was liable, in case of their failure against the acceptor; and the deed in question only contained specific provisions as to the debts enumerated and specified in the schedule thereto annexed; and the Court cannot enlarge its construction so as to render it operative beyond such specified demands.

Mr. Serjeant *Wilde* now shewed cause.—Admitting that the general words of a deed may be restrained or controlled by a particular recital; yet, here, the obvious meaning of the parties was, that all the defendant's creditors should receive ten shillings in the pound, in full of their respective demands; and that, on giving security for the payment of such sum, the debtor should be freed from all his liability. The defendant proposed to pay his several creditors ten shillings in the pound, *in full for their respective debts*. That must be taken to mean the whole of such debts, and the full amount due to each creditor should have been inserted in the schedule: the release, which is in the most general terms, discharges the defendant from all bills, notes, and sums of money, and also from any debt, claim, or demand, in respect of any security, account, or reckoning, then standing between the creditors and the defendant; by which the liability of the latter, as the drawer of the bill in question, was clearly discharged; and it

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would be a fraud on the other creditors if it were not so; for, they were induced to suppose that the sum inserted by the plaintiffs in the schedule, was the full amount of their demand on the defendant, and that might have induced them to sign the deed; whereas, in point of fact, they reserved their entire claim as to the greater part of their demand; and, although it may be said that they anticipated receiving the amount of the bill in question from the acceptor, yet it was a fraud on the sureties, who became responsible for the payment of the last instalment on seeing the full amount of the debts inserted in the schedule. In *Jackson v. Lomas (a)*, where an insolvent assigned his effects, in trust for his creditors, and, before the whole of them had executed the deed, one of the creditors executed it on the faith of a private agreement with the insolvent, securing to the creditor an additional advantage—it was held, that the agreement was fraudulent and void. So, in *Leicester v. Rose (b)*, it was decided, that, if a creditor of an insolvent executes a general composition deed, in consideration of a particular creditor first executing it, any assurance or security given to the latter for his proportion beyond the rest, and unknown to the former, is fraudulent and void; and here, the other creditors could not know that the plaintiffs had a demand on the defendant for the amount of the note in question, as they had only inserted 156*l.* in the schedule as being the amount of their debt, and on which they agreed to accept the composition. In *Holmer v. Viner*, the bills which formed part of the creditor's demand, and which he did not prove under the deed of composition, were not due at the time the deed was executed; whilst the bill in question was due a week before; and yet, Lord *Kenyon* said, that the creditor could not split his demands and come in under the composition deed for part, and sue for the remainder at a subsequent time. In *Cecil*

(a) 4 Term Rep. 166.

(b) 4 East, 372.

v. Plaistow, Mr. Baron *Hotham* said (a): "Where there is a composition to take a smaller sum than the whole debt, a creditor signing it cannot afterwards claim any other debt then due to him; and a composition, by which creditors agree to take the effect of their respective demands in a less beneficial manner than they were before entitled to, and to sign a false schedule in order to induce them to come into that measure, is to deceive and defraud them." So, in *Harrhy v. Wall* (b), where a creditor signed and executed a composition deed, although he did not set the amount of his debt opposite to his name in the deed, yet he was held to be bound by the terms of the composition, to the amount of his then existing debt. With respect to the case of *Payler v. Homersham*, which has been relied on for the plaintiffs, it merely decided, that, if the provisions in a deed are, upon the face of them, applicable to two different items, it may be averred in pleading, to which of the two they were intended to be applied. Here, however, the creditors who signed the schedule represented the amount set opposite their respective names as the whole of their demands on the defendant, and the plaintiffs must be bound by it, otherwise it would be a fraud on the sureties, who were induced to become responsible for the payment of the last instalment, on the ground that the whole of the defendant's debts were included in the schedule; and the other creditors were also led to believe that the plaintiffs had taken the composition for the whole of their demand.

Mr. Serjeant *Taddy* and Mr. Serjeant *Jones*, in support of the rule.—Although it must be admitted that fraud will vitiate every transaction, yet, here, there was no fraud in fact; for, the plaintiffs only wished to obtain payment of the bill in question from *Murphy*, the acceptor,

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(a) 1 Anstr. 203.

(b) 1 Barn. & Ald. 103.

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and accordingly specified the amount of the sum opposite to their names in the schedule, for which they agreed to compound, and which was according to the terms mentioned in the recital of the deed, by which the general words in the release must be restricted and controlled. The cases relied on for the defendant cannot avail him, as they are inapplicable to the circumstances of this case; for in those cases the agreements were held void, either on the ground of fraud, or that the creditors had expressly contracted to compound for the whole of their debts; whilst, here, the plaintiffs were limited to the amount of those inserted opposite their names in the schedule. In *Leicester v. Rose*, all the creditors engaged to accept payment of their *whole* debts. But, in *Payler v. Homersham*, although the deed recited that the creditors had agreed to take fifteen shillings in the pound upon the whole of their respective debts, and the release contained words equally large and extensive as in the present case; yet, the Court held, that a creditor might compound for a part of his demand only, on the ground, that the general words in the release were restrained by the previous recital in the deed. That case is not only in point for the plaintiffs, but was confirmed and acted on by Lord Chief Justice *Best*, at *Guildhall*, in the late case of *Fennell and Others v. Day (a)*. There, the plaintiffs proved the receipt of a sum by the defendant for their use. The defendant then proved a general release by deed, in the usual form, dated and executed by the plaintiffs after the payment to the defendant. On the release, the sum of 825*l.* 4*s.* 6*d.* was written opposite the plaintiffs' names. Upon this, they proposed to give in evidence, two promissory notes of which the defendant was the maker, and the plaintiffs the payees, dated before the payment of the sum to the defendant, to recover which the action was brought, and amounting together to the

(a) C. P. *May* 1st, 1828.

precise sum of 825*l.* 4*s.* 6*d.*; upon which it was objected for the defendant, that the notes were not admissible in evidence to alter or control the deed: But the Lord Chief Justice decided that they might be received, and said, that he was of opinion that the case of *Payler v. Homersham* was in point, as it established the principle, that general words in a deed might be restrained by the recital; otherwise, parties might release rights of which they were ignorant, and, intending to discharge one debt, would discharge another: and the Jury found a verdict for the plaintiffs. In *Harry v. Wall*, there was manifest fraud; as the claimant on the note refused to specify the amount of his debt, or to put any sum opposite to his name in the deed, although the note on which the debt was founded was in the hands of his own bankers at the time; and, in the report of that case at *Nisi Prius*, Lord *Ellenborough* said (a): "If a creditor signs a deed of this nature, and declines to specify the amount of the debt for which he compounds, he should not subscribe his name in an unqualified manner, which may have the effect of inducing others to sign, under the impression that he has compounded for the whole of his demand." Here, however, the plaintiffs specified in the schedule the amount of the debt to which they intended the release to apply, and it was not done with a view to mislead or defraud the other creditors. In *Cecil v. Plaistow*, the proceedings were in a Court of equity, and instituted on behalf of a married woman, who had been improperly induced to join her husband in the security on the composition, and there were no words of restriction in the deed. In *Holmer v. Viner*, there was clear evidence of fraud, as the drawer of the bill was about to make the defendant a bankrupt, but was prevailed on by the plaintiff to compel him to execute the composition deed. Here, however, the plaintiffs had a distinct and separate demand against the acceptor of the

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(a) 2 Stark. Rep. 198.

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bill, and they had a right to limit their demand on the defendant to the amount specified in the schedule; for, the securities were wholly distinct. Their immediate remedy was against the acceptor; and, as the defendant requested that the bill should not be included in the schedule, there was no fraud as against him or his creditors, as the property of their debtor was not affected by the transaction. If the plaintiffs' demand had arisen on a bond, instead of a bill of exchange, the defendant must either have pleaded payment, accord and satisfaction, or a release. The two former could not have availed him; and, if he had pleaded the latter, and the release were given in evidence, as the only sum mentioned in the deed in which it was contained was 156*l.*, it could only apply to that sum, and not to that which the plaintiffs sought to recover in this action. This may be assimilated to a case of bankruptcy; and in *Harley v. Greenwood* (a), it was held, that the election of a creditor to take the benefit of a commission is confined to the debt actually proved, and does not extend to distinct debts *ejusdem generis* due at the same time. So, here, the plaintiffs might elect to take a composition *quoad* one debt, but not as to another which was distinct and independent of the former. As, therefore, the plaintiffs obtained no new security, and did not split an entire demand, and there was no fraud on the defendant or the other creditors, they are entitled to recover on the bill in question, as they only meant to receive a composition on the amount of the bill inserted in the schedule, but to leave the other untouched.

Lord Chief Justice Best.—I still continue to entertain the same opinion I formed at the trial; and I there came to the conclusion I did, independently of the terms of the composition deed; and, on now advertng to that instrument, my opinion is fortified and confirmed. It was evi-

(a) 5 Barn. & Ald. 95.

dently the intention of the parties, that the defendant should be released from all the then existing demands of those creditors who signed the deed. I do not feel myself embarrassed by my own decision in *Fennell v. Day*; and although it is said, that I decided that case on the authority of *Payler v. Homersham*, yet I merely held that the general words of a deed might be restrained by the recital, according to the principle established by that case; and that a debtor might make a composition for a portion of his debts, where all the other creditors are cognizant of the fact. But, the question now before us was not raised in that case, and is, in terms, whether one creditor can split his debt, or divide his demand on his debtor, without mentioning the circumstance to the other creditors who consent to sign the deed of composition. If he does so clandestinely, and they remain in ignorance of the fact, it is clearly a fraud upon them. I do not, however, mean to impute moral fraud to the defendant, but it is a fraud in point of law; and a practice of this description, if sanctioned, would tend, in a great measure to encourage gross fraud. Considering, therefore, that the case of *Payler v. Homersham* is altogether beside the present question, I think the nonsuit was proper, and that it may be supported on the authority of other decisions. I acted on that of *Holmer v. Viner*, which is not to be considered as a mere decision at *Nisi Prius*, as it appears that the plaintiff, against whom the Jury found a verdict, afterwards moved for a new trial, which was refused, as the Court of *King's Bench* agreed in opinion with Lord *Kenyon*, and adopted his ruling at the trial. There, the plaintiff had two demands, and, having signed the deed of composition for one only, and not for the other, Lord *Kenyon* said, "That it was not to be allowed, that a party, having several demands against an insolvent person, should *split those demands*, and come in under the composition deed for part, and sue for the remainder at a subsequent time;" and he assigned as a reason, that it would be a fraud upon the

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other creditors, as well as an oppression of the debtor, who had given up all his property to constitute a fund for their benefit. That language applies expressly to the present case, and no decision has been cited as tending to control or refute it. In *Leicester v. Rose*, it was held, that the taking a different security from the debtor by some of the creditors, was a fraud on the others, as they ought all to be placed in the same situation; and that where the creditors in general have bargained for an equality of benefit and mutuality of security, it was not competent for one of them to secure any partial benefit or security to himself. The case of *Harrhy v. Wall* does not bear very strongly on the present, as there the deed was executed in blank, the creditor not having set the amount of his debt opposite to his name; and, in *Cecil v. Plaistow*, the Court of *Exchequer* acted on the principle which I adopted at *Nisi Prius*, and am now disposed to uphold, *viz.* that, where a creditor obtains from his debtor a new or separate security for part of his demand, and takes the composition for the other part only, it is a fraud on the other creditors; for, as was said by Mr. Baron *Hotham*, "it is an unfair attempt to gain a superior advantage over them, by a fraudulent concealment of the truth." Here, therefore, the plaintiffs ought not to have signed the deed for a less sum than was actually due to them from the defendant; and the full amount of their demand should have been inserted in the schedule, otherwise the other creditors might have been entrapped, or induced to sign the deed by being led to believe that the whole of the plaintiffs' demand was inserted therein. Therefore, without requiring the aid of any authority on the subject, the principle applicable to this case appears to be, that, where several creditors meet and agree to sign a composition deed, they must be all supposed to stand in the same situation, and one ought not to conceal any circumstance from the others, so that he may gain an advantage by such concealment; and, if he does, it operates as a fraud upon them. Here, the

plaintiffs agreed to take ten shillings in the pound from the defendant. The other creditors might thereby be induced to believe that it was as much as his estate could pay, and that it was therefore useless for them to stand out for their demand in full, or require twenty shillings in the pound, when the plaintiffs said that they were willing to accept ten; and, if they were led to suppose that the plaintiffs signed for the whole of their demand, when, in point of fact, they did not sign for one third, it was impossible for the other creditors to form a fair or correct judgment on the subject. At all events, the plaintiffs' remedy was against *Murphy* as the acceptor of the bill, and they ought not to have sought to recover its amount from the defendant, as the drawer; as they looked to *Murphy* alone, expecting that he would pay it. Independently, therefore, of the terms of the deed, I am clearly of opinion, that, if we decided in favour of the plaintiffs' claim, we should establish a rule that would lead to the grossest fraud in the execution of instruments of this nature. As to the analogy that has been supposed to exist between cases of bankruptcy, and those of parties compounding with their creditors, it does not appear to me to apply. In the former case, there is no undertaking or agreement between the creditors, that each shall be placed in the same situation. There is no previous meeting, but the property of the bankrupt is vested in the petitioning creditor, who acts on his own responsibility; and the other creditors do not rely upon, nor are they influenced by, his judgment. Here, however, the only question is, whether, upon looking at the terms of this deed, even with that degree of refinement with which it is impossible for common sense to keep pace, it is not evident that the other creditors were led to suppose that the plaintiffs had compounded for *all their demands* on the defendant, and that the full amount was inserted in the schedule. It has been insisted, however, that the words "upon and in respect of our *said se-*

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held the bill in question at the time the above deed was executed; and it was contended, for the defendant, that it was an answer to the action; and the case of *Holmer v. Viner* (a) was relied on, to shew, that, where a party has several demands, on different accounts, against a person who becomes insolvent, and he consents to execute a deed of composition, he cannot be allowed to split his demand, and, by proving only part under the deed of composition, to sue for the remainder at a subsequent time.

For the plaintiffs, the case of *Payler v. Homersham* (b) was relied on, to shew, that the general words of the release contained in the deed were restrained by the recital, that the defendant was indebted to the creditors in the several sums mentioned and set forth in the first column of figures set opposite to their respective names in the schedule thereunder written; and that the plaintiffs did not release any greater sum than that so set opposite their names.

The Lord Chief Justice, however, was of opinion, on the authority of *Holmer v. Viner*, that the plaintiffs could not split or sever their demand, and that it was, in point of law, a fraud upon the other creditors, who might have been led to suppose that the plaintiffs had, under the terms of the deed, engaged to receive a composition upon the whole of their claims, when, in point of fact, they were receiving it only on a part; and he accordingly directed a nonsuit, reserving to the plaintiffs leave to move to set it aside, and that a verdict might be entered for them, in case the Court should be of opinion that the plaintiffs were, under the circumstances, entitled to recover the amount of the bill in question.

Mr. Serjeant *Taddy*, in the last Term, accordingly obtained a rule *nisi*, on the ground, that the plaintiffs had

(a) 1 Esp. Rep. 131.

(b) 4 Mau. & Selw. 423.

been guilty of no fraud in law, as they only intended to compound for the amount of the bill drawn by the defendant on *Dauincey*, on the belief that the bill in question would be paid by *Murphy*, the acceptor; and, therefore, they had not included it in the schedule. They only meant that the release should operate in discharge of the amount of the sum mentioned in that schedule, and not to all the demands they might have on the defendant independently of that debt. The bill in question must be considered as an *ultra* or private security, for which the plaintiffs had a remedy against a third party at the time the deed was executed, and for which the defendant was liable, in case of their failure against the acceptor; and the deed in question only contained specific provisions as to the debts enumerated and specified in the schedule thereto annexed; and the Court cannot enlarge its construction so as to render it operative beyond such specified demands.

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Mr. Serjeant *Wilde* now shewed cause.—Admitting that the general words of a deed may be restrained or controlled by a particular recital; yet, here, the obvious meaning of the parties was, that all the defendant's creditors should receive ten shillings in the pound, in full of their respective demands; and that, on giving security for the payment of such sum, the debtor should be freed from all his liability. The defendant proposed to pay his several creditors ten shillings in the pound, *in full for their respective debts*. That must be taken to mean the whole of such debts, and the full amount due to each creditor should have been inserted in the schedule: the release, which is in the most general terms, discharges the defendant from all bills, notes, and sums of money, and also from any debt, claim, or demand, in respect of any security, account, or reckoning, then standing between the creditors and the defendant; by which the liability of the latter, as the drawer of the bill in question, was clearly discharged; and it

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been since universally adopted, and is still acted upon. It appears to me, that no person of common sense can read this deed, without saying that the object of all the parties was, that the defendant should be discharged from all existing debts then due to those creditors who agreed to accept the composition, and afterwards signed the deed. The persons who agreed to become sureties for the defendant for the payment of the last instalment, would not have done so, if they had not thought that he was to be discharged from all the then existing demands of his creditors; and that, when they had signed the deed, he would go forth to the world a free man: and not that he should be afterwards liable to be called on for a debt actually due and owing to the plaintiffs at the time the deed was executed. Although there might have been an agreement between the plaintiffs and the defendant, that the former might endeavour to procure payment from *Murphy*, the acceptor of the bill, yet, if they found that there was no chance of succeeding against him, they ought not to be allowed to resort to the defendant. I, therefore, think that there is no ground to disturb this nonsuit.

Mr. Justice BURROUGH.—I also think that this nonsuit was perfectly right. We ought not to allow a lax construction of deeds of this description, which are executed on the supposition that all the creditors are to stand in the same situation; and, here, it is quite clear that all those who signed the deed meant that the defendant should be released from the whole of the demands which they then had against him; if so, the full amount of the plaintiffs' debt should have been inserted in the schedule; for, as the deed recites at the commencement, that the defendant was indebted to his creditors in the several sums mentioned in the schedule, it is the only exception specified in the deed, which is general in every other respect, and, therefore, shews that no other exception ought to be

implied. It is the peculiar province of Courts of law, to put a legal construction on policies of assurance, charter-parties, and other instruments of a like description. In the late case of *Withington v. Herring* (a), we were called upon to construe the nature and effect of a power of attorney, which we held to give authority to an agent abroad to raise money on account of his principals, although no such power was expressed in the deed; but, the words were of the most extensive nature, and there was nothing to narrow or control them. So, here, the release is framed in the most extensive words possible, and is not controlled by the recital, or by any other part of the deed. By the release, the defendant was discharged from all existing demands which the creditors who signed it had against him; and when they had done so, he was, from that moment, to be considered as free. The plaintiffs having sued the defendant in *assumpsit* as the drawer of the bill, the deed was properly given in evidence under the general issue; and, when produced, was conclusive against them, as, by the terms of the release therein contained, the defendant was discharged from all existing bills, notes, securities, and other demands, which they had against him before and at the time of signing the deed.

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Mr. Justice GASELEE.—Although I am not prepared to concur with the Court in the decision they have just pronounced, I am far from regretting the conclusion to which they have arrived: because the rule they have laid down will be most beneficial to the public at large, as it will tend to prevent fraud in the execution of instruments of this nature. I admit, that, by a deed of composition, a debtor should be discharged from all the demands of the creditors who sign it. But, I very much doubt whether, by the authorities as they now stand, we are warranted in so holding. The case of *Holmer v. Viner*, cer-

(a) *Ante*, p. 30.

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tainly bears a near resemblance to the present ; but, there, the debtor gave up the whole of his property, as he executed an assignment of *all his effects* to trustees, for the benefit of the creditors at large. Here, however, it does not appear that the defendant gave up his property ; for, the creditors who signed the composition deed, agreed to take his own notes for the four first instalments, payable at four, eight, twelve, and fifteen months, and the last instalment only was secured, which merely amounted to one shilling and six-pence in the pound, as being the residue of the composition. In *Leicester v. Rose*, there was a private stipulation between some of the creditors and the insolvent, that he should procure them a collateral security, sufficient to cover the whole of their demand ; which was a fraud on the rest of the creditors, because, they having held out to the latter that they would come in under the general agreement, had, notwithstanding, stipulated for a further partial benefit to themselves. These cases, therefore, appear to me to be distinguishable from the present, whilst that of *Payler v. Homersham* is directly in point ; and I doubt whether we ought to overrule it, which we shall in effect do by the present decision. There, a release contained in a deed, which recited that the defendant stood indebted to his creditors in the several sums set against their respective names, and that they had agreed to take of the defendant fifteen shillings in the pound upon the whole of their respective debts, whereby the creditors, in consideration of the said fifteen shillings in the pound paid to them before executing the release, each and every of them did release the defendant from all manner of actions, debts, claims and demands, in law and equity, which they, or any or either of them, had against him, or *thereafter could, should, or might have*, by reason of any thing from the beginning of the world to the date of the release—and it was held to release nothing but their respective debts, and all actions and demands touch-

ing them. Therefore, where, to an action of debt brought by the plaintiffs on the defendant's bond, the latter pleaded this release; it was held, that the plaintiffs might reply, that the bond was given by the defendant with others, as a security for the re-payment of bills drawn upon them by the defendant, and for monies advanced to him; and that the sum set against their names in the release was due to them from the defendant on the day of the release on his own account, and the monies intended to be secured by the bond, although part was due at the time of executing the release, were not, nor was any part, included, or meant by them, or by the defendant, to be included in the sum set against their names, or in the release:—The Court came to that conclusion, on the principle that the general words of a release had reference to, and might be restrained by, the particular recital; and Lord *Ellenborough* said: “Common sense requires that it should be so; and, in order to construe any instrument truly, you must have regard to all its parts, and most especially to the particular words of it.” Here, the recital in the deed shews the sums to which the release was to apply, *viz.* those set forth in the schedule; and the words of the release in *Payler v. Homersham* were as general and extensive as in this case. This Court also held, in *Pearsall v. Summersett* (a), that the extent of the condition of an indemnity bond might be restrained by the previous recitals, although the words of the condition imported a larger liability than the recitals contemplated; and, here, it appears to me that the agreement by the creditors to accept ten shillings in the pound in full for their respective debts, refers to the sums mentioned in the schedule, and not to the debts generally. As, therefore, I feel it impossible to distinguish this case from *Payler v. Homersham*, I cannot fully concur with the Court in the

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(a) 4 Taunt. 593.

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conclusion to which they have arrived; yet, I am happy to say, that the result will be most beneficial to the public.

Rule discharged.

Monday,
 May 18th.

WRIGHT v. WALES.

The defendant, a *fen-reeve*, or person having the care of certain commonable lands, supposing the plaintiff to be a wilful trespasser, caused him to be apprehended and taken before a magistrate, who dismissed the complaint. The plaintiff then brought trespass against the defendant, and obtained a verdict, which the Court set aside, and directed a nonsuit to be entered, on the ground, that, as the defendant was acting under colour of the statute 7 & 8 Geo. 4, c. 30, he was entitled to notice of action under the 41st section: —*Held*, also, that he was entitled to his full costs as between attorney and client, by virtue of that clause.

THIS was an action of trespass and false imprisonment. At the trial, before Mr. Justice *Hobroyd*, at the last Summer Assizes for *Suffolk*, it appeared that the plaintiff was employed in making a road over certain common lands, of which the defendant, as *fen-reeve*, had the care; and, considering the plaintiff to be a wilful trespasser, he caused him to be apprehended and taken before a magistrate, who refused to receive the complaint; on which the present action was brought, and the Jury found a verdict for the plaintiff, leave being reserved to the defendant to move the Court to enter a nonsuit. The rule was obtained accordingly, and made absolute in the last Term, on the ground that the defendant was entitled to notice of action under the 41st section of the statute 7 & 8 Geo. 4, c. 30 (the malicious trespass act), as the defendant had reason to suppose that he was acting under colour of that statute, although the plaintiff was not, in fact, committing a wilful or malicious injury at the time he was apprehended (*a*).

Mr. Serjeant *Wilde*, on a former day in this Term, obtained a rule *nisi*, that the Prothonotary might tax the defendant his costs, as between attorney and client, under the 41st section of the act; which, for the protection of persons acting in execution of the act, enacts, “that, if a verdict shall pass for the defendant, or the plaintiff *shall become nonsuit*, or if, upon demurrer, or otherwise, judg-

(*a*) See *Ante*, Vol. 2, p. 613.

ment shall be given against the plaintiff, the defendant shall recover his full costs as between attorney and client, and have the like remedy for the same as any defendant hath by law in other cases." The Court have already decided, that the defendant was entitled to the notice of action required to be given by that clause, and he is consequently entitled to his costs in the terms as prayed.

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Mr. Serjeant *Storks*, and Mr. Serjeant *Bompas*, now shewed cause.—In order to entitle the defendant to his costs under the 41st section, the plaintiff should have been found committing an offence against the act, so as to justify his apprehension under the 28th section; or the defendant should have been acting in pursuance of the statute, so as to entitle him to the benefit of the 41st section, which in fact he was not; he merely supposed that he was acting under colour of the statute, and the plaintiff was not a trespasser or offender within the meaning of the act.

But, the Court said, that, as they had decided in the last Term, that the defendant was entitled to the benefit of the 41st section, with respect to the notice, and that, as it had not been given, the action could not be sustained, and that a nonsuit must be entered, it was conclusive on the plaintiff; and that they saw no reason to induce them to believe that they had come to a wrong conclusion.

Rule absolute.

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Tuesday,
May 19th.

GARNER v. SHELLEY and two Others.

By the rules of a Friendly Society, twelve persons were annually chosen as a committee, who were empowered to settle and determine all grievances, differences, and disputes which might arise relative to the affairs of the Society, subject to an appeal to two magistrates, by a party grieved; and each member was to pay three shillings annually to the Society's medical attendant. The plaintiff, who had been duly appointed such attendant, was dismissed by the committee, without any previous notice, and another person appointed in his stead, but against his consent, and without any meeting of the members at large. Disputes having arisen respecting the plaintiff's dismissal, upon an application by

THIS was an action of *assumpsit*. The declaration contained counts for money had and received by the defendants to the plaintiff's use, and for money due upon an account stated between them.

The cause came on for trial before Mr. Justice *Gaselee*, at the last Assizes for the county of *Stafford*, when the Jury found a verdict for the plaintiff—damages, 15*l.* 9*s.*, subject to the opinion of the Court upon the following case:—

“The plaintiff is a surgeon and apothecary. In the year 1821, a Friendly Society was established at *Yoxall*, subject to certain rules, orders, and regulations, which were in due manner allowed, confirmed, and approved, by the Justices of the Peace assembled at the General Quarter Sessions of the Peace for the county of *Stafford*, held, by adjournment, on the 10th *August*, 1822; and the said rules, orders and regulations, as well as the tables of the Society, were, on the same day, deposited with the Clerk of the Peace, and enrolled at the same Sessions. Among the said rules, orders, and regulations, are the following, (that is to say)—

“*First*—‘That the Society was established for the purpose of raising by subscription from the several members thereof, and by voluntary contributions, a stock or fund for their mutual relief and maintenance, in old age, sickness, and infirmity, and for the benefit of the widows and re-

the committee to two magistrates, they recommended a general meeting of the Society; which was convened accordingly, and a large majority of the members voted for the plaintiff, who sued the stewards of the Society for the allowance received from the members for his services subsequently to his dismissal. The Jury found, that the committee did not act *bond fide* in dismissing the plaintiff:—*Held*, that, as such dismissal was not a grievance or dispute within the jurisdiction of the committee, the plaintiff was entitled to recover in an action for money had and received; and that the stewards were not bound to pay over the allowance received from the members, to the person appointed in the plaintiff's stead, although the committee ordered them to do so.

presentatives of deceased members, in certain cases, and for no other purposes whatsoever.'

"*Second*—' That twelve discreet and intelligent persons, members of the Society, should be annually chosen as a committee, which committee, or any five of them, including the stewards, or their proxies, should have the power to inquire into, settle, and determine, all grievances, differences and disputes whatsoever, which might or should arise relative to the affairs of the Society, save and except that the parties aggrieved might appeal to any two magistrates, as empowered by the acts relating to Friendly Societies. That the committee, under the control of the high and deputy stewards, should have power to lend and dispose of the Society's money at interest, in such way and manner, and in such sums, as they believed to be most advantageous to the Society, taking good and proper security for the same. That the old committee should nominate and appoint the persons composing the new one, and six of them at least should be annually changed by ballot. That immediately after the new committee was chosen and formed, they, the said committee, should agree upon and appoint three sufficient, discreet, and intelligent persons, among the twelve composing such committee, to act as stewards, the one as high steward, the other two as deputy stewards, to assist and help him, the said high steward, in the execution of his office. Any person refusing to serve the office of high steward should forfeit 5*s.*; and, refusing to serve as deputy steward, 2*s.* 6*d.* The high steward, in all matters of dispute or disagreement, either in the committee or Society at large, should always have the power and privilege of the casting voice; and, if he should find it requisite to consider further the subject under discussion or in dispute, he should, for that purpose, be at liberty to withhold his determination for the space of one month, or twenty-eight days, provided the subject would admit of such delay. That the three stewards should give their joint

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bond to the Society for the stock entrusted to their care and disposal. That they should make up their accounts, and deliver up every thing belonging to the Society to the succeeding stewards, the next club night after their being appointed, or forfeit 10%.; and that no action or suit whatsoever should be commenced without the approbation and consent of the committee (or the major part of them), the high steward having in that, as in all other cases, the privilege of the casting vote.'

"*Sixteenth*—'That each member should pay three shillings annually, to the Society's doctor, in consideration of which, in case of sickness or lameness, he should be entitled to the necessary medicines and attendance his situation might require. Every member to pay the doctor, whether in or out of his limits, provided he resided not more than five statute miles from *Yoxall*; and the first payment should become due on the 19th *March*, 1822.'

"By the *twenty-third*, three trustees, whose names were therein mentioned, were appointed.

"The other rules and regulations did not affect this case.

"When this society was established, in 1821, the plaintiff was duly appointed the doctor to the Society, and continued to fill that situation, without any interruption, till the month of *August*, 1826; but, before that time, complaints of his negligence and misconduct as such doctor had been made by different members of the Society, to the high steward, and to some of the members of the committee.

"On the 14th *August*, 1826, a meeting of the committee was held, at which eleven members attended. No notice was given of this meeting to the plaintiff. After the committee had assembled, the plaintiff was sent for, but was not at home and did not attend. A Mr. *Fernyhough* was also sent for. At this meeting, the complaints against the plaintiff were discussed, but no evidence was given of the facts, and a vote for his dismissal, and the appointment of

Mr. Fernyhough was carried. Eight persons voted for *Fernyhough*, and two for the plaintiff. **Mr. Jackson**, the then high steward, stated that the meeting was called to choose a fresh surgeon for the poor, in the room of **Mr. Garner** (the plaintiff), because he had not attended as he ought to have done; but it did not appear whether any notice had been given of the meeting, or, if any, what were its contents.

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“ The following is a copy of the resolution of the committee:—

“ ‘ Resolved, that **Mr. John Garner**, the surgeon and apothecary of the Society, be henceforth dismissed from that office; and that **Mr. Joseph Fernyhough**, surgeon and apothecary, be appointed to succeed him; and a proper proportion only of the members’ subscription to the surgeon and apothecary be paid to the said *John Garner*, for the period he has acted as such, during the present year, to this time; and that the remainder of such subscription be paid over to the said *Joseph Fernyhough*.’

“ Also ordered, that a copy of the following notice be delivered to **Mr. Garner** forthwith.

“ ‘ Sir,—You are hereby informed, that, the committee of the *Yoxall* New Friendly Society having met this day to consider the propriety of continuing you as surgeon to the Society, it is agreed that your services shall cease from this day. I remain, for the deputy stewards and committee, your’s &c.

‘ *John Jackson*.’

“ A copy of such notice was delivered to the plaintiff on the same or on the following day. The proportion of the members’ subscription up to that time was paid to the plaintiff, who did not, however, acquiesce in the dismissal, but had continually from thence attended as many of the members of the Society as would permit him to do so;

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amounting to more than the majority: and seventy-five of them, the whole number being from one hundred to one hundred and ten, signed a paper approving of him as the doctor. It did not appear when the resolution was signed. On the 1st *December*, 1827, it had no signatures.

“ The learned Judge left it to the Jury to say, whether the proceedings of the committee were *bond fide* for the investigation of the complaints, or merely for the purpose of getting rid of the plaintiff and appointing another medical man in his stead. The Jury found the latter, and said that the plaintiff was an injured man.

“ The plaintiff had been and then was a member of the Society.

“ The defendants, on the 19th *March*, 1827, were elected stewards of the Society, and continued to act as such till *May*, 1828; and, in the early part of that year, received from each of the several members of the Society, according to the usual course, the sum of three shillings for their respective payments to the Society’s doctor, under the sixteenth rule, for one year, ending on the 19th *March*, 1828, which amounted in the whole to 15*l.* 9*s.*

“ Upon the 11th *March*, 1828, the following order was made by the committee and entered upon the books of the Society:—

“ ‘ At a meeting of the stewards and committee of the *Yoxall* New Friendly Society, held at the *Golden Cup* Inn, in *Yoxall*, this 11th day of *March*, 1828—Ordered, that the sum of 15*l.* 9*s.* be paid to Mr. *Joseph Fernyhough*, surgeon and apothecary to the said Society, that sum being the amount due to him for medicines and attendance for and on the sick and lame members thereof. We, the undersigned stewards and committee of the Society aforesaid considering the said Mr. *Joseph Fernyhough* the legally appointed surgeon and apothecary to

such Society; and, we also further ratify and confirm his appointment to the said office, as witness our hands.'

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" This order was signed by the high steward and ten other members of the Society.

" Disputes having arisen respecting the aforesaid vote of dismissal of the plaintiff, the committee (including the present defendants), and many members of the Society, attended before two of the Justices of the Peace of the county of *Stafford*. It was denied, on the part of the defendants, that the magistrates had authority, under the statutes (a), to settle the matter themselves, or make any order respecting it; but, upon their recommendation, a public meeting of the Society was held on the 17th *December*, 1827, of which the following notice had been given.

" ' *Yoxall* New Friendly Society, *Dec.* 6th, 1827.

" ' It having been agreed, in pursuance of the recommendation of the magistrates, at their meeting at *Wichnor Bridges*, on *Saturday* last, that the votes of the members should be taken at the next club-meeting, to be held on the 17th *December* instant, for a surgeon to the club, you are requested to attend to give your vote on that occasion.'

" The meeting was attended by the present defendants, who were stewards, the rest of the committee, and by a very large majority of the members of the Society; and at such meeting fifty-three voted for the plaintiff, eleven were neuter, and three voted for the rival surgeon.

" The plaintiff, before the action was brought, demanded the above sum of 15*l.* 9*s.* of the defendants, who refused to

(a) 33 Geo. 3, c. 54.—35 Geo. 3, Geo. 3, c. 125.—59 Geo. 3, c. 111.—43 Geo. 3, c. 111.—49 128.

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pay him, alleging that the committee considered Mr. *Fernyhough* to be the legal doctor."

The question for the opinion of the Court was—

"Whether the plaintiff was entitled to recover from the defendants the said sum of 15*l.* 9*s.* above demanded, or any and what part thereof. If the Court should be of opinion that the plaintiff was so entitled, the verdict was to stand for such sum as they should think fit; if not, a nonsuit was to be entered."

The case now came on for argument:—

Mr. Serjeant *Spankie*, for the plaintiff.—The Jury having found that the plaintiff was duly appointed the doctor or medical attendant to the Society, on its being established in 1821, it was incumbent on the defendants to have shewn that he was legally dismissed. The rules did not empower the committee to amove him from his situation, their duties being limited and confined to the care of the funds and finances of the company; for, the second rule only empowers them to dispose of the society's money at interest, and for the old committee to nominate and appoint a new one; but it is altogether silent as to the appointment of a surgeon or any other person or officer than stewards, who were to be appointed by the new committee. Besides, the plaintiff had no notice of the meeting in which the resolution for his dismissal was passed; and, even in the case of a corporation, who have a power to amove a member, such power must be exercised by an assembly duly convened by summons. The *King v. The Mayor of Doncaster* (a). The learned Serjeant was proceeding with his argument, when he was stopped by the Court, who called on—

Mr. Serjeant *Russell*, for the defendants.—If the rules of a Friendly Society be framed in conformity with the sta-

(a) 2 Burr. 738. See also *The King v. The Mayor of Liverpool*, Id. 723.

tutes by which it is formed and regulated, there can be no doubt but that the committee may appoint and remove any officer belonging to such society; and here the committee had a power to appoint a doctor or medical attendant; and they had, consequently, an authority to dismiss him without the sanction or concurrence of the society at large. By the second rule, they were empowered to inquire into, settle, and determine, all grievances, differences, and disputes whatsoever, which should arise relative to the affairs of the society. They, therefore, had a right to dismiss the plaintiff, complaints having been made as to his negligence and misconduct, by several of the members; previously to the convening of the meeting at which he was dismissed. But, even if the plaintiff were not properly dismissed, he cannot be entitled to recover as against the defendants in this action, as they were restrained from paying over the money he now seeks to recover, by the order of the committee of the 11th *March*, 1828; and the defendants were bound to act in obedience to that order. The statute 59 *Geo.* 3, c. 128, s. 9, enacts, "that the rules of every Society or Institution formed under the authority of that act, shall contain provisions with respect to the powers and duties of the members at large, and of such committees or officers as may be appointed for the management of the affairs of such Society, and that such Society should not be subject to the provisions and restrictions of the 33 *Geo.* 3, as to the appointment of committees, or otherwise, with respect to the management of such Society;" and, here, it appears that the rules were duly confirmed and approved of by the Justices at Sessions. The committee, therefore, might dismiss the plaintiff, if they thought that the person who was to succeed him would pay more attention to the members of the Society; but, actual complaints had been made against him. Although it has been said, that he had no notice previously to his dismissal, yet he was sent for after the committee had assembled;

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and, as the proportion of the members' subscription was paid to him up to that day, and he received it without making any objection, it must be taken to operate as a submission to the act of dismissal. If the plaintiff had felt himself aggrieved, he ought to have made his complaint to two magistrates, under the statute 33 *Geo. 3, c. 54, s. 15*; and, although the committee attended before such Justices, yet they declined to act, but delegated their authority to the committee, which they ought not to have done. But, as *Fernyhough* was appointed to succeed the plaintiff, at the meeting in *August, 1826*, and the defendants were not elected stewards until the 19th *March, 1827*, they are liable to pay him; particularly, as they were in terms directed to do so by the previous order of the 11th *March*, and by which *Fernyhough's* appointment was ratified and confirmed. If, therefore, he were to commence an action against the defendants to recover the sum found to be due, and directed by the committee to be paid to him, there could be no legal defence; and the plaintiff now seeks to recover that identical sum.

Lord Chief Justice BEST.—I am of opinion that this action is maintainable. In the first place, it does not appear to me, that the matter which the committee have taken upon themselves to decide, can be considered as a grievance or dispute within the terms of the second rule, or as being within their province to determine. If they intended to prefer a complaint against the plaintiff, he should have had previous notice of it; but it was left to the Jury to say, (and properly), whether the proceedings by the committee were *bond fide*, for the investigation of the complaints, or merely for the purpose of getting rid of the plaintiff, and appointing another medical man: and they found that it was for the latter purpose only. They have, therefore, found, in effect, that the meeting was convened to dismiss the plaintiff, and appoint another in his stead, who was

a friend of some of the influential members. But the parties afterwards attended before two magistrates, who recommended a meeting of the society to be held, which was convened accordingly, and it was decided by a great majority of votes, that the plaintiff should remain; and, as that meeting was attended by the defendants and the rest of the committee, it must be taken that they acquiesced in the recommendation of the magistrates, and the plaintiff's rights were then restored to him. Although it has been said, that, if the defendants pay to the plaintiff the sum sought to be recovered by him in this action, they will be liable to pay a like sum to *Fernyhough*; yet, if they pay him, they will do so in their own wrong, as I am clearly of opinion, that, under the circumstances, the plaintiff is entitled to recover.

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Mr. Justice PARK.—I am of the same opinion. It appears that the society was established for the purpose of raising a fund for the relief and maintenance of the members in old age, sickness, and infirmity, and ten times the amount of the sum which the plaintiff seeks to recover, has been expended out of the funds in the defence of this action.

Mr. Justice BURROUGH.—I think there should have been a summons, appearance, and hearing, previously to the dismissal of the plaintiff; and it does not appear by the case that it was at all authorized.

Mr. Justice GASELEE concurred.

Postea to the plaintiff.

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HUNT v. BLAQUIERE.

Where the wife obtained a divorce *a mensâ et thoro*, by the sentence of the Spiritual Court, for adultery on the part of the husband, and he was ordered, by a decree of that Court, to allow her alimony, by quarterly payments, but he omitted to do so:—*Held*, that he was liable to a tradesman for necessities supplied to the wife:—*Held*, also, that furniture for a house might be considered as necessities, provided it were suitable to the rank and income of the wife.

THIS was an action of *assumpsit* for goods sold and delivered. Plea—The general issue.

At the trial, before Lord Chief Justice *Best*, at *Guildhall*, at the Sittings after the last *Michaelmas* Term, it appeared, that the defendant, a General in the army, had, in 1814, married Lady *Harriet*, the daughter of the Marquis of *Townsend*, who had 6,000*l.* for her fortune; that, a few years after the marriage, the defendant treated her with cruelty, frequently struck her, and eventually sent her to her former home, and forbade her to enter his house again; that, in the year 1820, the Ecclesiastical Court pronounced a decree of divorce *a mensâ et thoro*, on the ground of adultery committed by and proved against the defendant—who was also ordered by a decree for alimony, to allow his wife 380*l. per annum*, for her separate maintenance; that the defendant had resided in *France* ever since the decree; and that, in 1827, the plaintiff, an upholsterer at *Brighton*, furnished a house there for Lady *Harriet*, which, including bedding, &c., amounted to 489*l.*, the sum sought to be recovered by this action. It was also proved, that only 695*l.* had been received by Lady *Harriet*, on account of alimony, from the date of the decree to the time the furniture was supplied; and that the Court directed the alimony to be paid to her quarterly.

For the defendant, it was contended, that the liability which devolved upon a husband, and which was founded on the marriage, must cease, when the connection between him and the wife was partially dissolved by a divorce *a mensâ et thoro*, which is a legal separation between man and wife, and a recognized dissolution of the marriage; and that, in addition to this dissolution, the wife having obtained an allowance of alimony, by the decree of the

Ecclesiastical Court, no agency of the husband could be implied in the wife to bind him, even for necessities; and that thereby her right to do so was for ever forfeited: that Lady *Harriet* had made her election by going to the Ecclesiastical Court, and by which she lost her right to resort to a Court of common law; and that her only remedy was to endeavour to enforce payment of the alimony; and that a tradesman is bound to inquire into the character and circumstances of a female before he gives her credit; that a decree for alimony differs from a case where the husband covenants by deed to allow the wife a separate maintenance, as such decree is of itself notice to all mankind, and the effect of which is, that the wife can no longer be considered as the implied agent of the husband.

The Lord Chief Justice was of opinion that a divorce *a mensâ et thoro* granted on the complaint of the wife for the infidelity of the husband, and a decree of alimony founded thereon, could not so operate as totally to destroy the relative situation of the parties; for that, if they did, the wife might absolutely starve in the event of the alimony not being paid:—He said, that it was incumbent on the defendant to shew that the decree had been complied with, by actual payment, by which alone he could be exonerated from his liability to pay for necessities supplied to the wife; that, if the Jury should be of opinion that Lady *Harriet* had been compelled to quit the defendant's house and society, by his cruel conduct, she must be regarded as having been turned out of doors, and by which she would have an implied credit for necessities, and for which the defendant was liable; that no provocation could justify a man in striking his wife, and that, if he so conducted himself as to render it impossible for a virtuous woman to continue in his society, she must be considered as sent upon the world with credit: and his Lordship finally left it to the Jury to say, whether the furniture supplied by the plaintiff to the defendant's wife was necessary and

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suitable to her rank and situation in life, and for a style of living not exceeding 380*l.* a year, that being her limited rate of income by the terms of the decree.

The Jury found, that the defendant had struck his wife and turned her out of doors, and gave a verdict for the plaintiff for the whole of his demand; leave being reserved to the defendant to move to set it aside, in case the Court should be of opinion that the defendant's wife was, by the decree of divorce *a mensâ et thoro*, and the award of alimony, divested of all authority, either express or implied, to act as the agent of the husband, so as to bind him for debts she might contract for necessaries.

Mr. Serjeant *Spankie*, in the last term, obtained a rule *nisi*, that this verdict might be set aside and a nonsuit entered instead thereof, on the grounds—*First*, that, as there was a divorce *a mensâ et thoro*, and a decree for alimony in the Spiritual Court, the defendant was not liable to be sued at common law, even for necessaries supplied to the wife. If the parties had agreed to live separate by mutual consent, the husband is not only bound to secure a provision for the maintenance of the wife, but *to pay* it, as a consent to dissolve the *vincula matrimonii* is *in fraudem legis*; but, here, the wife has her remedy by enforcing the decree for the payment of alimony, and it must be presumed to be paid, till the contrary be shewn. It was, therefore, incumbent on the plaintiff to prove that it had not been paid, but there was not even evidence to shew that the wife had ever applied for it. *Secondly*—Furniture for a house cannot be considered necessary for a woman divorced from her husband, and who had only an allowance or income of 380*l. per annum*. She might and ought to have taken lodgings; and in *Smith v. The Sheriff of Middlesex*, Lord *Ellenborough* said (*a*): "I know of no case

(a) 15 East, 610.

where a husband has been held liable upon a contract for the hire of goods made by his wife living apart from him, as for necessaries."

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Mr. Serjeant *Wilde*, and Mr. Serjeant *Russell*, now shewed cause.—It is quite clear that a divorce *a mensâ et thoro* does not annul or destroy, or even suspend, all the incidents attending the marriage state; nor does a decree of alimony against the husband discharge him from the implied credit which the wife has for necessaries, unless he shews that he has complied with the decree, by due payment of the alimony awarded to his wife for her support. The divorce was obtained on the ground of adultery committed by the defendant; and the terms of the decree are, "that Lady *Harriet Blaquiere* ought, by law, to be divorced and separated from bed, board, and mutual cohabitation with the defendant, her husband, until they shall be reconciled with each other." Such a divorce does not constitute the wife a *feme sole*, nor invest her with any attributes as such. She cannot make contracts on her own credit, nor is there any alteration in her condition, or limitation of her civil rights or responsibilities, except to justify her in living separate and apart from her husband, on the terms limited by the decree. In *Lewis v. Lee* (a), it was expressly decided, that a divorce *a mensâ et thoro*, for adultery by the wife, does not destroy the relation of marriage, but merely suspends for a time some of the obligations arising out of that relation. So, in *Ellah v. Leigh* (b), it was determined, that, if a *feme covert* living separate from her husband, and having alimony allowed her by the Ecclesiastical Court pending a suit there, obtain credit in her own name, she cannot be sued as a *feme sole*; and in *Marshall v. Rutton* (c), where all the former cases were reviewed, Lord *Kenyon* said (d): "We find no authority in the books,

(a) 3 Barn. & Cress. 291.

(b) 5 Term Rep. 679.

(c) 8 Term Rep. 545.

(d) Id. 548.

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to shew that a man and his wife can, by agreement between themselves, change their legal capacities and characters; or that a woman can be sued as a *feme sole*, while the relation of marriage subsists, and she and her husband are living in this kingdom." Here, the suit for the divorce was instituted for the benefit of the wife, and the decree for alimony is not to deprive her of the implied credit by which she is to procure necessities for her subsistence, but only to give her a more immediate or direct remedy against the husband: but the decree cannot be enforced against the defendant, as he left this country shortly after it was pronounced, and has not since returned. The decree was for *permanent* alimony, and the Court allowed the wife a moiety of the value or rental of an estate, of which the defendant was in possession, independently of her own fortune. *Blaquiere v. Blaquiere* (a). If, indeed, he had paid the alimony, he might have pleaded such payment in discharge of his further liability; and, if he had proved it, it might have been an answer to this action: but he has only paid 695*l.*, which will not cover two years' alimony, whilst nine are now due. In *Thompson v. Hervey* (b), it was held, that a pension from the Crown would not discharge the husband from his liability to be sued by his wife's creditors, by whom she was supplied with necessities; and here, the defendant can only be discharged, by duly and regularly providing funds from which the wife might maintain herself; and, as she was driven to live apart from him, solely through his own misconduct, nothing but actual payment according to the terms of the decree, can divest him of his liability to support her. In *Manby v. Scott* (c), the wife quitted her husband under circumstances of great impropriety, and he not only refused to take her back, but forbade the tradesman who furnished her with goods to trust her; and the

(a) 3 Phillimore, 258.

(b) 4 Burr. 2177.

(c) 1 Sid. 109; S. C. 1 Mod. 124,
1 Lev. 4.

decision of the Court turned mainly on the goods being supplied, contrary to the express prohibition of the husband. According to the report of that case in *Levinz*, Mr. Justice *Twisden*, and Mr. Justice *Mallet*, held, that the husband should be charged, and asked (a)—“Though alimony be recoverable in the Spiritual Court, yet, if the husband be obstinate, and will not obey their sentence, how shall the woman live? And, if he will obey it, yet, how shall she live in the mean time?” In *Burrett v. Booty* (b), where, on the separation of husband and wife, the former, by deed, conveyed property to trustees, for the use of the wife; in an action against him for a debt subsequently contracted by the wife for lodging, it was held, that it was incumbent on the husband to shew that the trustees gave effect to the deed, by taking possession. So, in *Nurse v. Craig* (c), it was held to be no defence to an action of *assumpsit* against the husband for necessities supplied to his wife, that he had covenanted with the plaintiff (a trustee) to pay the wife a separate maintenance, without averring or proving the regular payment of the allowance; and Mr. Justice *Chambre* asked (d)—“Of what use is the covenant for an allowance, if the maintenance be not paid? It does not give a credit to the wife; for, no action can be brought against her. Is she to be taken into a Court of equity, and to wait the usual period for decisions of this sort? How is she to subsist in the mean time?” Here, the only mode of compelling the defendant to comply with the terms of the decree, is by a writ *de excommunicato* or *de contumace capi-endo*, which cannot be executed against him, as he is beyond the jurisdiction of the Spiritual Court. He ought to have appointed an agent here, to pay the alimony regularly to his wife; and it is not incumbent on a tradesman who furnishes her with necessities, to shew that it has not been paid. If it

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(a) 1 Lev. 5.

(c) 2 New. Rep. 148.

(b) 8 Taunt. 343.

(d) Id. 153.

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had been paid, the articles supplied by the plaintiff would be deemed necessary for her support; and, whether they were to be considered as necessary or not, was, most properly, left to the Jury: and they have found in the affirmative. The liability of the defendant does not depend on a mere contract, but on an absolute duty to support his wife with necessaries; and in *Tugwell v. Heyman* (a), Lord *Ellenborough* held, that, if executors neglect to give orders for their testator's funeral, and have sufficient assets for the purpose, they are liable upon an implied promise to the person who furnishes the funeral in a manner suitable to the testator's degree and circumstances. In *Ozard v. Darnford* (b), Lord *Mansfield* said, that, "where husband and wife live separate, the person who gives credit to the wife is to be considered as standing in her place, inasmuch as the husband is bound to maintain her; and the Spiritual Court, or a Court of equity, will compel him to grant her an adequate alimony." Although, in *Anstey v. Manners* (c), Mr. Justice *Park* said, "that the liability of a husband for the debts of his wife does not continue after a divorce;" yet, there, the sentence was a *vinculo matrimonii*, as the Court pronounced the marriage to be null *ab initio*.

Mr. Serjeant *Spankie*, and Mr. Serjeant *Stephen*, in support of the rule.—The decree for alimony exonerates the defendant from the liability of payment for necessaries afterwards supplied to his wife, and the only remedy a tradesman who furnishes them may have, is, by seeking to enforce the decree. There is a wide distinction where man and wife are separated by a divorce, and alimony is decreed, and where the husband covenants by deed to provide a separate maintenance for her; for, if the parties separate them-

(a) 3 Camp. 298.

(b) Selw. Nisi Prius, 7th Edit. 247. (c) Gow's N. P. Cas. 11.

selves voluntarily, and by their own act, the husband can only discharge himself by actual payment of the wife's allowance; as such an agreement is contrary to policy and morality, and is considered as a nullity by the Spiritual Court: but a decree of that Court is recognised by a Court of common law, and has ever been considered as binding on the parties. Although it must be admitted, that a divorce *a mensâ et thoro* does not dissolve the *vinculum matrimonii*, yet it gives the husband and wife distinct and separate rights; if they marry again, they may be proceeded against in the Ecclesiastical Court, although they are not indictable for felony under the statute 1 Jac. 1, c. 11, as they fall within the exception in the third section. But, after such a divorce, the wife cannot administer to the husband's effects, as she has a separate interest, and is not such a wife as is entitled to administration; *Shute v. Shute* (a); and the husband cannot release her rights. In *Chamberlaine v. Hewson*, Lord Chief Justice Holt said (b): "If a *feme covert* sue sole in the Ecclesiastical Court for defamation, as she may, if she cohabit with her husband, he may release the costs; but, if they are divorced *a mensâ et thoro*, he cannot release the costs: and the reason is, that, if they are divorced *a mensâ et thoro*, the husband allows his wife alimony, and the costs of the suit are out of the alimony, and, therefore, he cannot discharge one more than the other. *Matteram's* case (c) is the very same." In *Nurse v. Craig*, Sir James Mansfield said (d): "Where a woman is put into a situation with respect to certain property, as a *feme sole*, no credit is given to the husband; but those who supply the wife trust only to the separate fortune which they know that she has. Nor can any assent of the husband be implied, where he has executed a

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(a) *Proc. in Chan.* 2nd Edit. 111.

(b) 5 Mod. 71.

(c) 1 Salk. 115; S. C. 3 Bulst. 264; 1 Rolle's Rep. 426.

(d) 2 New Rep. 162.

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deed covenanting to pay a certain stipulated sum; for, I cannot imagine that he could mean to make himself liable to any other payment." Here, however, the character and condition of the parties which resulted by law from the state of marriage, is altered, not by their agreement, but by the sentence of a Court of competent jurisdiction, Although, therefore, the defendant was, by the divorce, discharged from all liability on which an implied *assumpsit* might be raised; yet the decree for alimony is conclusive, and might be enforced against him: and every remedy at law is thereby excluded, as it was a sentence pronounced *in rem judicatam*, and the only relief the wife could obtain would be by an application to the Spiritual Court, to enforce the decree; and a tradesman who supplies her with necessaries, stands precisely in her situation, and has, through her, a right to resort to the decree, which is his only redress. The plaintiff should have shewn that the defendant was contumacious, or that he had refused to comply with the decree, but no proof was offered that the wife had ever demanded the arrears of the alimony alleged to be due to her. In *Manby v. Scott*, the decision did not turn altogether on the elopement of the wife, or the prohibition by the husband to the tradesman to give her credit, but on the principle that she ought to have applied to the Spiritual Court. It must be observed, too, that that case was determined in the time of the commonwealth, when there was no Ecclesiastical Court to which the wife could appeal; but Mr. Justice *Hyde*, in his argument, expressly put it upon that point, and said (a): It is not sending the wife to another law, but leaving the case to its proper jurisdiction, it being of ecclesiastical conusance." So, Lord *Hale*, in his argument in that case, in treating of the mode in which the necessities of the wife should be supplied, said (b): "Although the law will not presume so

(a) 1 Mod. 132.

(b) See Bac. Abr. 5th Edit. Vol. 1; 492.

much ill, that a husband should not provide for his wife's necessities, yet there is a severe obligation on him, not only to supply her in case of exigencies and extreme necessity, but according to conveniency; but the law has not made her her own judge, or provided her a judicature sufficient to reform the close-handedness of her husband; where she is driven to an extreme necessity and want of subsistence, the law has appointed a Judge to compel the husband to supply her, I mean the Chancellor. Then, for her conveniencies, the law has appointed the Bishops' Courts. And, whereas, it is said, that this is not the common law; I answer, that they are jurisdictions appointed by the common law; and, concerning the amplitude of their power, which is said not to be able to administer a remedy sufficient for this disease, I say, as it is aided by the *brachium seculare*, the power of it falls as severely upon them that disobey it, as the common law can use when men will not pay their debts; for they may excommunicate, and, upon that follows imprisonment, and a disability to sue any action." Here, the wife, by suing in the Ecclesiastical Court, and obtaining the decree, has made her election, and she can pursue no other remedy, *expressum facit cessare tacitum*; and as she has a legal sentence of a Court of competent jurisdiction, the implied liability of the husband at law is merged in the decree for alimony, which may be enforced either by her or her creditor; as, by it, a separate property is set apart for the maintenance of the wife; and, it must be assumed, that the husband has obeyed the decree; and there was no evidence of a notice or other process having issued, or any attempt made by the wife to enforce it, or that the defendant had refused to comply with it. In *Keegan v. Smith* (a), the husband was deemed liable for necessities provided for his wife, while a suit was pending in the Ecclesiastical Court, and alimony had not been decreed when the plaintiff's demand accrued;

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(a) 5 Barn. & Cress. 375.

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and Lord Chief Justice *Abbott* said: "At the time when this credit was given, it was uncertain whether any or what alimony would be allowed." But, if the husband refuses to pay the wife the alimony decreed, there is, besides the ordinary process of excommunication, a writ at common law, *de estoveriis habendis*, in order to recover it (a); and the form of the writ is to be found in *Cowell's Interpreter* (b), and in the *Registrum Brevium* (c); and although the better remedy now appears to be by a writ *de excommunicato capiendo*, yet recourse may be had to the former (d).

As to whether the articles supplied by the plaintiff to the defendant's wife can be considered as necessaries, it was, at all events, incumbent on the plaintiff to have inquired into her state and circumstances, before he furnished the house. But, as he did not prove that he made such inquiry, he executed the order at his peril. Even if Lady *Harriet* had been living with her husband, the house ought not to have been furnished without his sanction or concurrence. What is reasonable for a lady in her station of life, living apart from her husband, is a question for the Court rather than a Jury; and in *Smith v. The Sheriff of Middlesex*, where a married woman living separate from her husband, was supplied by a tradesman with furniture on hire, Lord *Ellenborough* said, that the husband was not liable as for necessaries supplied to the use of the wife. This action therefore cannot be sustained.

Lord Chief Justice *Best*.—This was an action by the plaintiff, a tradesman, by which he sought to recover the price of certain household furniture, which he had pro-

(a) 1 Bl. Com. 441.

(b) Tit. "Alimony."

(c) Page 89.

(d) In *Manby v. Scott* (1 Lev. 6), it is said, that this writ, though ancient, is still law, although the law has now provided another remedy

against the obstinacy of the husband, by a writ of *excommunicato capiendo*. But now a writ *de contumace capiendo* is substituted for that writ by the statute 53 Geo. 3, c. 127, which is in the nature of an attachment for contempt.

vided and delivered to Lady *Harriet Blaquiere*, the defendant's wife. At the trial, a verdict was found for the plaintiff, and a motion has been made to set it aside, and that a nonsuit might be entered instead thereof, on two grounds:—*first*, that a decree of the Ecclesiastical Court, awarding alimony to Lady *Harriet*, is an answer to the action—and, *secondly*, that the articles supplied by the plaintiff were not such necessaries as should be furnished to a married woman, or to a lady in her situation of life. I shall confine my opinion to the facts which were proved at the trial, and which were expressly found by the Jury, viz. that the defendant had struck his wife and turned her out of doors. Now, if a man turn his wife out of doors, he thereby gives her an implied credit for all necessaries supplied for her support and maintenance, according to her degree, or the rank in society in which she has moved. This is a general principle, and fully established by several decisions; and the defendant is answerable in this action, unless the obligation cast upon him by turning his wife out of his house, be discharged by his subsequent conduct. It has been said, however, that the decree of divorce *a mensâ et thoro*, and the award of alimony by the Ecclesiastical Court, is a sufficient discharge. But the payment of alimony by the husband should be proved, if not, a tradesman may maintain an action of this description, as if no such decree had existed; and no decision has been cited, that a mere decree for alimony is sufficient to discharge or exonerate the husband. Although, in *Manby v. Scott*, the opinions of some of the Judges seem favourable to such a doctrine, yet the point decided in that case was wholly beside the present question. There, a tradesman had furnished necessaries to a woman who had eloped from her husband, and who afterwards wished to be reconciled to him. It must, therefore, be inferred, that she left him for some improper purpose, or eloped with a criminal intent; as the true definition of the word *elopement* is, where a married

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woman, of her own accord, goes away from her husband, and lives with an adulterer (a); and, as the husband, in the case to which I have referred, refused to receive his wife back again, it was held, (and most properly) that he was not liable for necessaries, for such a woman would be unfit to be the mistress of a family, or have the care of her children. In *Govier v. Hancock* (b), it was held, that a husband was not bound to receive or support his wife after she had committed adultery, although he had before committed adultery himself; and the Court said, that the question depended upon this, whether the necessaries were provided before or after the wife had committed adultery: if after, the action could not be maintained. Undoubtedly, in *Manby v. Scott*, some of the Judges say, that the wife should apply to the Ecclesiastical Court; but that such is her only resource, is contradicted by daily practice. If it were not so, none of the actions which have of late been frequently brought by tradesmen for necessaries furnished to married women, could be sustained. Although I entertain the greatest possible respect for whatever fell from Lord *Hale*, yet his opinion in *Manby v. Scott* seems to be contradicted, if not answered, by Mr. Justice *Twisden*, who said (c): "Although the wife depart from her husband, yet she continues his wife, and she ought not to starve." If a husband turn his wife out of doors, he is bound to maintain her, and from that circumstance alone his liability arises *quasi ex contractu*; and, it is not necessary, in such a case, to imply an actual contract, for an implied credit is thereby given to the wife, for which the husband is liable, he having done an act which he could not be justified in doing. I should, therefore, feel no difficulty in deciding this case upon principle, without the guide or assistance of any authority; for, the

(a) See Tomlin's Law Dictionary, 3rd Edit. tit. "Elopement."

(b) 6 Term Rep. 603.

(c) 1 Mod. 132.

defendant is clearly liable for necessaries supplied to his wife, unless he could shew that he had complied with the decree of the Ecclesiastical Court, and obeyed their order, by the payment of the alimony they thought fit to allow her. In *Nurse v. Craig*, three Judges of this Court held, that, if a husband, separated from his wife, by deed, covenant to pay her a certain allowance during their separation, and fails to do so, he is liable to a third person for necessaries supplied to the wife; and that case does not stand solely on its own authority, but its principle was extended by Lord Chief Justice *Gibbs*, in *Burrett v. Booty* (a), where, on the separation of husband and wife, the former, by deed, assigned certain property to trustees for the wife's use; in an action against the husband for a debt subsequently contracted by the wife, it was held, that he must shew that the trustees gave effect to the deed by taking possession: "for," said his Lordship, "if the husband does not take care that the trustees perform their part and pay the allowance, the wife is left destitute." But, it has been said, that this case is distinguishable, as the wife has made her election by resorting to the Ecclesiastical Court and obtaining a decree there. So, in *Nurse v. Craig*, she made her election by consenting to the contract or agreement made by the husband, to have a separate maintenance secured to her. But the husband is not discharged by such a contract, or by a decree; he can only be relieved by the due observance of it: that is his only legal discharge, and which is consonant with honesty and morality. I admit, that, in this case, if the alimony had been regularly paid to Lady *Blaquiere*, the defendant could not be charged, nor could this action be sustained, but he never performed the decree. There is, consequently, no pretence for saying that he should be exonerated or discharged by it. The decree was made in 1820, and by which the Court ordered the defendant to

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(a) 8 Taunt. 343.

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allow his wife, for alimony, 380*l.* a-year, she having brought him a fortune of 6,000*l.*, the interest of which would amount to 300*l.* *per annum*; and, from the time of the decree, to 1829, he had only paid 695*l.* But, it has been said, that, as the defendant's implied legal responsibility is merged in his express liability under the decree, the former cannot be resorted to, unless it be shewn that the decree is not available, from the contumacy of the defendant; but, as he was directed to pay alimony from a given day, and at stated times, he must be deemed contumacious if he do not pay at such periods; and, if he wishes to relieve himself from future liability, he must apply to the Court, and state his reasons or grounds for relief. But, until he does so, he is liable to pay according to the terms of the decree; and, if the wife has a remedy to enforce it, so has the tradesman who supplies her with necessaries. As to the writ *de estoveriis habendis*, it is now obsolete, and is not even to be found in *Fitzherbert's Natura Brevium*. But, admitting it to be still a common law remedy, yet it is not ancillary to the proceeding in the Ecclesiastical Court; and the wife's being entitled to such writ does not carry the matter further than her right to sue in that Court. Although she may elect to institute proceedings there, yet a tradesman who supplies her with necessaries cannot compel her to go there. I am, therefore, clearly of opinion that the defendant is not discharged from his liability: and this case appears to me to be far stronger than that of *Nurse v. Craig*, which is an express authority upon the point. But, independently of that decision, I think; that, upon principle, this action may be maintained.

As to whether the articles supplied by the plaintiff to the defendant's wife were necessary or not, was a question for the Jury to determine; and I left it to them to say, whether, with an income of 380*l.* a-year, it was fit that the daughter of a Marquis, should hire a house, and furnish it; whether the plaintiff supplied her with

proper and suitable furniture, was also a question for the Jury; or whether she was bound to live in furnished lodgings. They thought that it would be inconsistent with her income and station in life to be obliged to live in lodgings, and that the furniture in question was necessary and proper for the purpose for which it was supplied; and I am perfectly satisfied with their verdict.

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Mr. Justice PARK.—I concur in the opinion of my Lord Chief Justice, and think that this rule must be discharged. The question is, whether a deed given by a husband for the separate maintenance of his wife, or alimony awarded by a decree of an Ecclesiastical Court, will discharge him from his liability to a tradesman who supplies his wife with necessaries, when the sum secured by the deed, or decreed for alimony, is not paid. I am of opinion that it will not. The Jury have found that the defendant forced his wife from his house, and was guilty of cruelty towards her. No fault was attributed to her. The divorce was grounded on adultery proved to have been committed by himself; and, although alimony was decreed to the wife, he has only complied with it in a very trifling degree, as 2,660*l.* would be due to her from the date of the decree to the time the goods were supplied. But he is bound, under the circumstances, to provide for his wife, and is liable for necessaries supplied to her by another; and there is no decision to the contrary; but, from the case of *Manby v. Scott* to the present day, it has been uniformly held, that alimony must not only be *secured* but *paid* by the husband. In this, all the text writers agree; and, in *Bacon's Abridgment*, that learned compiler, in treating of how far the husband is bound by contracts for necessaries provided to his wife, sets out Lord Chief Baron Hale's argument in *Manby v. Scott* at length; the summary deduced from which, is as follows (a): "It is clear that a husband is ob-

(a) Bac. Abr. 5th Edit. tit. "*Baron and Feme*," (H.) Vol. 1, 488.

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liged to maintain his wife, and may, by law, be compelled to find her necessaries, as meat, drink, clothes, physic, &c., suitable to the husband's degree, estate, or circumstances; it seems also settled, that the wife is not to be her own carver, and that she hath not an absolute power of binding the husband by any contract of hers, though for necessaries, without his assent, precedent or subsequent; the law, therefore, in these cases, as it seems established by usage and practice, is, to leave it to the Jury to find whether the husband consented or not; and though no express consent or agreement of his be proved, yet, if it appears that she cohabited with her husband, and bought necessaries for herself, children, or family, the husband shall be chargeable, and the Jury may find, on their oaths, that they came to the husband's use, he being by law obliged to provide for them; also, if she cohabits with her husband, and is ever so lewd, he shall be liable for her necessaries, for he took her for better for worse; so, if he runs away from her, or *turns her away*, or forces her, by cruelty or ill usage, to go away from him: but, if he allows her a separate maintenance, or prohibits particular persons from treating her, he shall not be liable during the time that he *pays such separate maintenance*, nor for necessaries taken up of those persons particularly prohibited; for, in these cases, no consent, but rather the contrary, appears; but a general warning or notice in the *Gazette*, or other newspaper, not to trust her, is not a sufficient prohibition. Also, the Jury are to determine as to the wife's necessity, the husband's degree and circumstances, and the value of the things sold and delivered, and give a verdict, and assess damages accordingly." I do not feel myself called upon to differ from the decision to which the Court arrived in *Manby v. Scott*; as, there, the wife eloped from her husband, and lived away from him several years, and afterwards was desirous to return to him, but he refused to receive her: and Mr. Justice *Hyde*,

in delivering his judgment, quotes the case of the prodigal son, and says (a), "that the wife ought to be a penitentiary before the husband is bound to receive her, or give her any maintenance:" which is sufficient to shew that she had been living improperly. Although, in *Nurse v. Craig*, the Court did not agree, yet the opinion of Sir *James Mansfield* does not appear to me to be so satisfactory as those of Mr. Justice *Heath* and Mr. Justice *Chambre*; and the latter puts the case expressly upon the ground, that the wife's maintenance had not been paid. No sound distinction can be drawn, whether such maintenance be secured by a covenant in a deed, or by a decree of an Ecclesiastical Court; and, although it has been said, that the wife has her remedy at law, by a writ of *de estoveriis habendis*, and which she may pray in aid of the decree for alimony, yet it does not deprive a tradesman of his right of action against the husband for necessities furnished for her use; for, as Mr. Justice *Chambre* emphatically said (b), "if reason, justice, or humanity ought to govern in the present case, I think it my duty to consent to the allowance of this action, since all the reasons upon which exceptions to this kind of action have been founded, totally fail in the present instance;" and, after stating the case of *Todd v. Stoakes* (c), he says, that, "according to the report in Lord *Raymond* (d), it was averred in the plea that the *allowance was paid* according to the articles;" and, after referring to several other authorities he says, "that, in all these instances, it appears to have been thought necessary to lay a foundation for the exemption of the husband, by shewing that the maintenance had been *duly paid, as well as secured*." It has been said, however, that, in this case, the wife should enforce the decree of the Ecclesiastical Court; but she must first obtain funds for that purpose, and

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(a) See 1 Mod. 132.

(b) 2 New Rep. 152.

(c) 1 Salk. 116.

(d) Vol. 1, p. 444.

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it would be impracticable to execute a writ of *de contumace capiendo* while the husband is abroad. In *Nurse v. Craig*, Mr. Justice *Heath* said (a): "The common law does not relieve any man from an obligation, on the mere ground of an agreement to do something else in its place, unless that agreement be performed. The agreement could have no operation in destroying the husband's liability, by transferring the credit to the wife, unless accompanied by payment." Besides, that case is far stronger than the present, as there the trustee brought the action against the husband for necessaries supplied to the wife by the trustee herself, who was a party to the deed.

Whether the articles supplied by the plaintiff were necessary or not, as well as the reasonableness of the charges, were questions for the Jury; for, as was said by Mr. Justice *Hyde*, in *Manby v. Scott*, a Jury of mercers are very excellent and indifferent Judges to decide a controversy between a husband and wife, as to what articles of dress are fit or suitable for her degree. The case of *Keegan v. Smith*, does not appear to me to have any bearing on this question, as, there the credit was given before the decree for alimony was made, and it was uncertain whether any or what alimony would be allowed. Here, however, as the defendant neglected to pay the alimony decreed, his wife must starve, unless she obtained some credit from those tradesmen who might supply her with the articles necessary for her support. No satisfactory answer has been given to the case of *Oxard v. Darnford*, where Lord *Mansfield* expressly drew the distinction between actual payment of an allowance, and a mere agreement for an allowance; for, in his charge to the Jury, he laid it down as clear and decided law, that, "where the husband and wife live separate, the person who gives credit to the wife is to be considered as standing in her place, inasmuch as the husband is bound to maintain her;

(a) 2 New Rep. 156.

and the Spiritual Court, or a Court of equity, will compel him to grant her an adequate alimony. But, if she elope from her husband, and live in adultery, or if, upon separation, the husband agrees to make her a sufficient allowance, *and pays it*, in either of these cases, the husband is not liable; because, in the former case, she forfeits all title to alimony; and, in the latter, has no further demands on her husband." And, as in that case, the defendant and his wife had separated, and he had agreed to make her an allowance, but had never paid it, the Jury, under his Lordship's direction, found a verdict for the plaintiff, who had supplied the wife with board and lodging. That case seems to me to be precisely in point; and it appears, that in a similar case of *Turner v. Winter*, his Lordship nonsuited the plaintiff, because, on separation, the defendant had agreed to make an allowance to his wife, and had *regularly paid it*; notwithstanding the plaintiff had no notice of the transaction. In *Hodgkinson v. Fletcher (a)*, Lord *Ellenborough* left the question, as to the adequacy of allowance, to the Jury; and, in *Liddlow v. Wilmot*, his Lordship said (b): "The only question is, whether the wife has been provided with resources adequate to her situation. When the wife lives separately from her husband, without any fault of her own, the law provides that her husband shall be liable for her adequate maintenance."

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Mr. Justice BURROUGH.—I admit that it is incumbent on tradesmen who furnish supplies to a wife living separate from her husband, to look at her circumstances, and also to the cause of the separation. If she elope from her husband she can claim neither maintenance nor dower, because she has been guilty of an offence in the eye of the law; but, where her conduct has been correct, and no fault

(a) 4 Camp. 70.

(b) 2 Stark. Rep. 88.

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can be imputed to her, and the husband treats her with cruelty, or turns her out of doors, he is liable for necessities supplied to her, although she afterwards commits adultery. Here, all the fault is on the part of the defendant, and no imputation has been attempted to be cast on the wife. He has been ordered to allow his wife alimony, by a decree of the Spiritual Court, and now attempts to avail himself of his own wrong by neglecting to pay the alimony, and also refusing to pay tradesmen for necessities supplied to his wife. This I think he cannot do, either by law or on principle. By the decree for alimony by the Ecclesiastical Court, the husband is bound to pay it regularly to his wife, and he is placed in the same situation as if he had agreed to allow her a separate maintenance by deed. From the case of *Corbett v. Poelnitz* (a) to that of *Nurse v. Craig*, it was averred, on the record, that the wife's maintenance had been *duly paid*, as well as secured; and that has been the constant course of pleading, and if payment be not alleged or shewn, the husband cannot be discharged from his liability; and it is immaterial whether the payment is to be made according to the terms of a decree for alimony, or by the provisions of a deed by which the husband covenants to make an allowance to his wife. Here, the decree was, that the defendant should pay his wife 380*l.* *per annum*, by quarterly payments; and it was proved, that 695*l.* only had been paid, although nine years have elapsed since the decree was made.

As to whether the furniture supplied by the plaintiff was necessary or not, it is not for us to inquire. She formerly lived with her husband; and, as she was the daughter of a Marquis, and with a fortune of 6,000*l.*, she ought to be supplied according to her degree, and suitable to the station of life in which she had previously moved. She could not have lived in splendor or extravagance, as her

(a) 1 Term Rep. 5.

income was limited by the decree to 380*l.* a-year. Still, that was sufficient to enable her to keep a house, which might not be more expensive than ready furnished lodgings. Although it has been said, that it was incumbent on the plaintiff to shew that the defendant had not paid the alimony, yet he could not prove a negative. If it had been paid, it was the duty of the defendant to have shewn it, as he alone could be cognizant of that fact. With respect to the common law writ of *de estoveriis habendis*, I cannot find that such a writ was ever issued. It is sufficient to say that it has been long out of use, and was only given in lieu of alimony, which, in the case of a divorce *a mensâ et thoro*, is allowed for the support of a wife out of the husband's estate, according to the discretion of the Judge of the Ecclesiastical Court, on a consideration of all the circumstances of the particular case before him.

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Mr. Justice GASELEE.—This case has been so fully gone into by the Court that I shall confine myself to a few observations. There is no case to be found in the books where the wife has been precluded from obtaining credit for necessaries, if her husband has treated her with cruelty, or turned her out of doors, or, by indecency of conduct, has precluded her from living with him. In *Ozard v. Darnford*, Lord Mansfield said, "As, in all cases, the creditor is to be considered as standing in the wife's place, it imports him, when the wife lives apart from her husband, to make strict inquiry as to the terms of separation; for, in such cases, he must trust her at his peril:" and his Lordship drew the distinction between a mere agreement by the husband, and the *payment of the allowance* to the wife; and in *Turner v. Winter*, it appeared, that the husband had regularly *paid* the allowance. By this decision, we shall not go beyond the principle established in *Nurse v. Craig*, and there the action was brought by the trustee, who was a party to the deed, and who sued the husband in *assumpsit* for neces-

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saries supplied by such trustee to the wife. There, however, no objection was raised to the form of action, although the husband had covenanted for the payment of the allowance by deed; but I am clearly of opinion that the present was well brought, and that the plaintiff was, under the circumstances, entitled to recover. As to whether the furniture was necessary or not, or the charges reasonable, were questions purely for the consideration of the Jury, and were most properly left to them by my Lord Chief Justice. The rule for setting aside the verdict and entering a nonsuit, must, therefore, be—

Discharged.

Thursday,
May 21st.

JAMES EVANS v. WHYLE.

The defendant signed a guarantie, by which he undertook to be answerable to the plaintiff to the extent of 50*l.*, for any gold he might supply to *J. S.*, a jeweller, for the purpose of carrying on his trade. The plaintiff discounted bills of exchange for *J. S.*, and gave him the amount, partly in money, and partly in gold. *J. S.* did not indorse some of the bills, but the whole of the gold was used by him in his

trade:—*Held*, that this was not a supply or sale of gold within the meaning of the guarantie, so as to render the defendant liable under it, as the plaintiff became the purchaser of the bills; and that, as to those which were not indorsed by *J. S.*, he took them at his own risk.

On the discount of bills of exchange, one half of the amount was paid in cash, and goods were supplied for the other half. The goods were charged an extra price *per* month, according to the length of time the bills had to run, and interest was charged on the money advanced, at the rate of 5*l.* *per cent.* But the discounts being *bond fide*, and if bills had not been given the same charge would have been made for credit on the gold:—*Held*, that the transaction was not usurious.

THIS was an action on a guarantie, dated on the 3rd *April*, 1823, and signed by the defendant, and by which he undertook to be answerable to the plaintiff to the extent of 50*l.* for any gold he might supply to *Evan Evans*, (a working jeweller), for the purpose of carrying on his trade.

At the trial, before Lord Chief Justice *Best*, at *Guildhall*, at the Sittings after the last Term, it appeared, that the plaintiff, a refiner, supplied *Evan Evans* with gold, from the date of the guarantie to the end of *December*, 1825, when he became insolvent, and was indebted to the plaintiff in 63*l.* for gold. That, in the course of their dealings, *Evans* applied to the plaintiff, to discount some bills of exchange for him, which he did, by giving him cash for one half of their amount, and furnishing him with gold for the other. That the ready money price of gold was 4*l.* 7*s.* *per* ounce, and that the plaintiff charged an additional

shilling *per* month, according to the length of time the bills had to run, for instance, 4*l.* 9*s.* *per* ounce on a bill at two months, 4*l.* 10*s.* at three months, and so on progressively; and he also charged interest on the money advanced, at the rate of 5*l.* *per cent.* It was also proved, that, if bills had not been given, the same charge would have been made for credit for the gold, being at the rate of one shilling *per* ounce, *per* month, and that all the gold which the plaintiff furnished was used or manufactured by *Evans* in the course of his trade. Some of the bills were not indorsed by *Evans* to the plaintiff, and were dishonoured when due.

For the defendant, it was insisted, that the plaintiff could not recover, as the dealing between him and *Evans* was usurious, and that, although the gold was used by the latter for the purposes of his trade, still, that it was not *sold or supplied* to him by the plaintiff for such purposes, within the terms or meaning of the guarantie; but was, in fact, part of the consideration or purchase-money paid by the plaintiff for the bills he had discounted, and, as to those which were not indorsed to him by *Evans*, he was not liable for their amount, but the plaintiff took them at his own risk. His Lordship, however, was of opinion, that as all the gold was used by *Evans* in the course of his trade, although the plaintiff had taken bills for it from him, and charged him the discount, the transaction was within the terms of the guarantie, as the taking the bills might be beneficial to the defendant as the surety of *Evans*; as, if such bills had been paid by the acceptors or other parties to them, they would operate to discharge the defendant, *quoad* the gold supplied to *Evans* for their amount. The Jury accordingly found a verdict for the plaintiff—damages, 50*l.*

Mr. Serjeant *Wilde*, on a former day in this term, obtained a rule *nisi*, that this verdict might be set aside, and a new trial granted, on the grounds: *First*, that the contract was usurious—and *Secondly*, that the gold was not

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supplied on the terms, or within the meaning of the guarantie.

First, although in *Floyer v. Edwards* (a), where a person who sold gold and silver wire at three months' credit, but stipulated, that in case the money was unpaid, the vendee should allow him a half-penny an ounce, *per* month, till the debt was discharged; and the allowance was according to an usage in that particular branch of trade, but above the legal rate of interest; it was held, that the contract being a *bonâ fide* sale, was not usurious: yet, here, the gold was not sold in the course of trade, but was supplied as part payment on the discount of the bills; and as it was charged at a higher rate, according to the length of time the bills had to run, the contract was clearly usurious. In *Davis v. Hardacre*, Lord *Ellenborough* said (b), "where a party is compelled to take goods in discounting a bill of exchange, I think a presumption arises that the transaction is usurious. When a man goes to get a bill discounted, his object is to procure cash, not to incumber himself with goods. Therefore, if goods are forced upon him, I must have proof that they were estimated at a sum for which he could render them available upon a re-sale, not at what might possibly be a fair price to charge to a purchaser who stood in need of them."

Secondly, the gold was not sold to *Evans* for the purpose of carrying on his trade within the terms of the guarantie. The parties meant that he should only be supplied with gold which was absolutely necessary for manufacture; and the defendant, as his surety, could not be deemed liable for gold furnished on credit, by way of discount, which was a distinct and separate transaction, and a course of dealing not contemplated at the time the guarantie was given.

Lord Chief Justice BEST.—All the gold sold by the

(a) Cowp. 112; S. C. Loft, 595.

(b) 2 Camp. 376.

plaintiff to *Evans* was used by the latter in the way of his trade. The transaction on the discounting the bills was fair, and *bonâ fide*; and it did not appear that the plaintiff had made a higher charge for the gold than if it had been sold on credit, as it was the usual course of the trade to charge an extra shilling *per* ounce, *per* month, beyond the ready money price; and the Jury thought that it was reasonable. There is, consequently, no ground to disturb the verdict on account of usury; but whether the gold was supplied within the terms of the guarantie, is a question deserving consideration. The inclination of my mind now is, that it was not.

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The rule, therefore, was granted on that point only.

Mr. Serjeant *Taddy* now shewed cause.—Although the plaintiff discounted bills for *Evans* on the sale of the gold, yet, as the whole of it was used by him in the course of his trade, the supply was within the meaning of the guarantie; and there was nothing to exclude the purchaser from giving bills in payment, or to prohibit the seller from discounting them. Whether bills had been given or not, the gold was furnished at the same price, as it was proved that it was the regular practice of the trade to charge one shilling *per* month *per* ounce for credit. The bills, in fact, placed the defendant as a surety for his debtor in a far better situation, as they might have been paid by the acceptors or drawers, or other parties to them; and as there can be no question but that the sale of the gold to *Evans* was *bonâ fide*, it falls within the meaning of the guarantie, by which the plaintiff was to have the value of gold supplied by him to *Evans* secured to a given amount. If, indeed, any of the gold had been re-sold by *Evans*, it would have been a different question; but, as it was proved that the whole of it was used by him in his trade, and the parties contemplated that credit should be given to him to the extent of 50*l.*, the mode in which he

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proposed to pay for the gold would not alter the nature of the transaction; and if *Evans* failed to pay for it, the defendant undertook to do so, and he is, consequently, liable on such undertaking.

Mr. Serjeant *Wilde*, in support of his rule.—The plaintiff's demand on the defendant is not covered by the guarantie, which must be construed strictly, and in favour of the latter as a surety. Although the gold was applied by *Evans* to the purposes of his trade, yet the circumstances under which it was furnished were wholly beside the guarantie, as the gold was given in lieu of money on the discount of bills of exchange, of which the plaintiff became the purchaser; and he had his remedy against the different parties who might be liable on the bills, and by which he was deprived of his right to recover as against the defendant on his undertaking. If the plaintiff had drawn bills on *Evans* for the amount of the gold supplied, there could have been no doubt:—but *Evans* was no party to some of the bills, as the plaintiff did not even require him to indorse them; and a person who discounts a bill for another becomes the purchaser of it, and takes it subject to all its incidents, and at his own risk. So, if *Evans* had accepted bills drawn on him by the plaintiff for the amount of the gold, and dishonoured them, the latter would have been remitted to his original demand; but as he discounted bills drawn and accepted by third parties, it is immaterial whether he became possessed of them by the payment of money or by the delivery of gold. At all events, it was not a mode of dealing contemplated by the parties at the time the guarantie was given, or within its meaning or effect; and whatever a person gives upon the discount of a bill, becomes the property of the party for whom the bill is discounted. In *Ex parte Isbester*, Lord *Eldon* said (a), “there is a great difference between transferring a bill without putting your name to it, and indorsing it; in the one case it is a

(a) 1 Rose's Bkptcy. Cas. 23.

sale, and in the other a discount, subject, however, to the question of intention, whether the transfer was meant to take effect as a sale, or by way of discount. So, in *Ex parte Shuttleworth* (a), it was held, that a person giving cash for a bill without the indorsement of the person from whom he takes it, cannot prove it under his commission. In *Emly v. Lye* (b), where one of two partners drew bills of exchange in his own name, which he procured to be discounted with a banker, through the medium of the same agent who procured the discount of other bills drawn in the partnership firm with the same banker; it was held that the latter has no remedy against the partnership, either upon the bills so drawn by the single partner, or for money had and received through the medium of such bills, though the proceeds were carried to the partnership account; the money being advanced solely on the security of the parties whose names were on the bills *by way of discount*, and not by way of *loan* to the partnership, though the banker conceived at the time that all the bills were drawn on the partnership account. So, here, as the gold was supplied by the plaintiff to *Evans* on the discount of bills of exchange, to some of which the latter was no party, it amounted to a sale of the bills; and it must be inferred, that the plaintiff made the advances to *Evans* on the security of the parties whose names appeared on the bills; and there was clearly no debt from *Evans* to the plaintiff for gold supplied or sold by the latter within the meaning of the guarantie.

Lord Chief Justice BEST.—When we granted the rule *nisi*, it struck me that I took a wrong view of this case at *Nisi Prius*. I am now convinced that I did, and the consequence is, that there must be a new trial. The guarantie was not meant to apply to all gold to be used by *Evans* for the purpose of his trade, but to the *sale* of gold by the plaintiff to him, to be applied to that purpose. The ques-

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(b) 15 East, 7.

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tion then is, whether gold advanced by the plaintiff to *Evans*, together with money, on the discount of certain bills for him, is gold sold or supplied within the terms of the guarantie; I think it is not. The defendant only meant to pay for such gold as was *sold* by the plaintiff to *Evans*; and, if it were not sold, the defendant cannot be held responsible on his undertaking. Now the gold in question was not sold by the plaintiff, but given for the purchase of bills of exchange; and the two cases to which we have been referred, shew the distinction between payment for goods by money, or by bills of exchange. If bills of exchange be taken, the credit is thereby suspended until they become due, but the discount of a bill is the purchase of the bill; and the gold was supplied by the plaintiff to the original debtor, for the purchase of bills; and, therefore, the defendant, as his surety, has a right to say, that he only meant to be answerable to the plaintiff for gold sold by him to *Evans*, to be used in his trade, and not for gold furnished him in lieu of money on the discount of bills. This, therefore, was not a transaction within the terms or meaning of the guarantie, which, as against a surety, must receive a strict construction, and which ought to be so framed as to embrace, in letter and in spirit, the nature of the dealing or transaction intended to be guaranteed, so as to make the surety answerable for the default of the original debtor.

Mr. Justice PARK.—The distinction between payment for goods by bills of exchange, and the delivery of goods on discount, is clearly established by the cases cited. The doctrine of *remitter* is well understood, but does not apply to this case. If a party sell goods and take a bill of exchange in payment, if it be dishonoured, or turn out to be of no value, he is remitted to his original consideration; but if he deliver goods on the discount of bills, he becomes the purchaser of such bills; and if they are not indorsed to him by the party from whom he takes them,

he buys them at his own risk; for, in *Emly v. Lye*, Mr. Justice *Le Blanc* said (a), "where another security is not required, the party who discounts a bill of exchange, stands in the situation of a purchaser of the bill; and, therefore, according to the case of the *Bank of England v. Newman* (b), cannot recover against the person with whom he discounts it, and whose name is not on the bill, the money advanced by way of discount."

Mr. Justice BURROUGH, and Mr. Justice GASELEE, concurred.

Rule absolute for a new trial (c).

(a) 15 East, 12.

(b) 1 Ld. Raym. 442; S. C. Com. Rep 57.

(c) On the second trial, Lord Chief Justice *Tindal* left it to the Jury to say, whether the transactions between the parties were,

in substance, a sale of the gold, or whether they were merely colourable, and the real transaction a mere discount of the bills; and they found a verdict for the plaintiff. See 1 Mood. & Malk. 471.

TERRINGTON, surviving Assignee of PULLAN, a Bankrupt,
v. HARGREAVES and Another.

THIS was an action of *assumpsit* commenced by the plaintiff, in *Trinity Term*, 1827, as surviving assignee of one *William White*, deceased, who, with the plaintiff, were joint assignees of one *Richard Pullan*, a bankrupt. The declaration contained counts for money lent, money paid, money had and received, and on an account stated; and alleged promises by the defendant to *Pullan*, before he became bankrupt, and to the plaintiff and *White* as his assignees, and to the plaintiff alone, as surviving assignee of *White* since the bankruptcy. The defendants pleaded the general issue.

had committed an act of bankruptcy, but of which they had no notice:—*Held*, that such payment was protected, and that the assignees were not entitled to recover in an action for money had and received, after the statute 6 Geo. 4, came into operation, although the commission was sued out before the act was passed.

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Friday,
May 22nd.

The 82nd section of the statute 6 Geo. 4, c. 16, is retrospective, and applies to payments made before and at the time of the passing of the act. Therefore, where, before the passing of the act, the bankrupt paid the defendants, who were aware of his insolvency, a sum of money after he

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At the trial, before Lord Chief Justice *Best*, at *Guildhall*, at the Sittings after the last *Michaelmas* Term, the Jury found a special verdict as follows:—That *Richard Pullan*, the bankrupt, on the 26th *June*, 1822, was, and for some time before that day had been a trader, within the meaning of the bankrupt laws, at *Leeds*, in the county of *York*. That, on that day, he was indebted to the plaintiff *Terrington*, the petitioning creditor, under the commission afterwards issued against him, in the sum of 1,100*l.*, and upwards. That, being such trader, and being so indebted to *Terrington*, afterwards, on the said 26th *June*, 1822, *Pullan* became a bankrupt within the true intent and meaning of the statutes then in force concerning bankrupts. That a commission of bankrupt was issued against him, dated the 15th *May*, 1823, under which he was duly declared a bankrupt, and the plaintiff and *White* (whom the plaintiff hath survived), became and were the assignees of the estate and effects of the said bankrupt, according to the force, form, and effect of the said statutes, and the said plaintiff now is assignee of the said estate and effects. That *Pullan* was insolvent in the month of *February*, 1822, and remained so insolvent until the issuing of the commission of bankrupt. That the defendants, on the 4th *August*, 1822, received from *Pullan* the sum of 165*l.* 7*s.* 6*d.* being the first instalment of a debt due to them, for which they, with other creditors, had, on the 21st *March* preceding, agreed to take *Pullan's* notes, payable at four, eight, twelve, and sixteen months; and that at the time when they so received the said sum of 165*l.* 7*s.* 6*d.*, they knew that *Pullan* was insolvent, but did not know that he had committed an act of bankruptcy. But whether, &c., and if it should seem to the Court that the defendants did undertake and promise in manner and form as the plaintiff had complained, the Jury assessed his damages at 165*l.* 7*s.* 6*d.*

The case now came on for argument.

Mr. Serjeant *Wilde*, for the plaintiff.—The only question is, whether, under the particular circumstances of this case, the 82nd section of the statute 6 *Geo.* 4, c. 16, is retrospective or not. Although in *Churchill v. Crease* (a), the Court were of opinion that the expression “*payments made*,” must be considered as referrible to payments made before and at the time the statute was passed; yet here, as the commission was sued out long before the passing of the act, and the payment was made by the bankrupt after he had committed an act of bankruptcy, such payment cannot be protected under the clause in question, although the action by the assignee to recover back the money so paid was not commenced until after the act came into operation. It is found as a fact, that the defendants knew that the bankrupt was insolvent at the time they received the money from him, and to which the plaintiff is entitled as his assignee, as he had an existing right under the commission, which was sued out previously to the passing of the statute; and, in *Churchill v. Crease*, it did not appear that the party receiving the money knew of the insolvency of the person who paid it; and the commission was not sued out for more than a month after the statute had passed. The latter part of the 82nd section, applies to payments made *to* a bankrupt; but a payment *by* a bankrupt, after he has committed an act of bankruptcy, cannot affect the rights of assignees under a commission sued out previously to, and at the time the statute 6 *Geo.* 4, was passed. The Legislature have expressly pointed out when the act shall operate retrospectively, and when prospectively; and it is an established and general principle, that the Court cannot give the provisions of a statute an *ex post facto* operation, unless the words of the act will warrant such a construction, or they are imperatively called on by express enactment, so to do. The 135th section declares subsisting commissions to be valid, and enacts, “that nothing in the act con-

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(a) 2 Moore & Payne, 415; S. C. 5 Bing. 177.

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tained shall render invalid any commission now subsisting, or which shall be subsisting at the time this act shall take effect; or any proceedings which may have been had thereunder, *except as therein is specifically enacted;*" and the 136th section, which enacts that the 6 Geo. 4 shall not take effect before the 1st *September*, 1825, expressly excepts all enactments relating to certificates of conformity, which are to take effect upon the passing of the act; and here, as there was a valid and existing commission sued out before the statute was passed, and the payment was made by the bankrupt after an act of bankruptcy, on which that commission was founded, his assignee had still a right to prosecute his claim against the defendants under and by virtue of that commission. The 112th section, which makes it felony in a bankrupt for not surrendering, and delivering up his effects, was meant to operate retrospectively, as the words are "if any person against whom any commission *has been issued*, or shall hereafter be issued." So, the 123rd section makes provision for petitions for the allowance of certificates presented to the Lord Chancellor *previous to the passing* of the act; and the 131st enacts, that the bankrupt shall not be liable upon a parol promise to pay after the allowance of his certificate, under any *present or future* commission. But, as the general enactments have a prospective view, and the Legislature have expressly pointed out when the act was to operate retrospectively, it must be confined to those particular sections only, and cannot be extended to the general purview of the statute. Although as the word *made* in the 82nd section, is followed by those "or which shall *hereafter be made*," it may appear to have a retrospective operation; yet, when the former word is connected with the terms of the 135th section, it may be satisfied by confining it to cases where payments have been made before the act came into operation, and the commission was sued out subsequently to its passing; but where a payment has been made, and the commission sued out before the act was passed, and the assignees

under it had an existing right to sue by virtue of the former statutes, such payment cannot be protected by the 82nd section; and the 135th expressly declares all subsisting commissions to be valid. In *Maggs v. Hunt* (a), the act of bankruptcy was committed *after* the statute was passed, but *before* it came into operation; and, as the commission was founded on that act of bankruptcy, although it was not sued out until after the act came into effect; yet, the Court held, that it could not be supported, as there was no statute in force at the time the alleged act of bankruptcy took place. Here, however, the commission was sued out *before* the statute was passed; and, as the assignee had an existing right to sue the defendants before and at the time it came into operation, the payment having been made to them by the bankrupt more than two months before the commission was issued, the plaintiff is entitled to recover.

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Mr. Serjeant *Merewether*, for the defendant.—It must be admitted, as a general principle, that the words of a clause in an act of Parliament cannot have a retrospective or *ex post facto* operation, unless it be so declared by the Legislature; and the intention must be looked at, at the time the statute was passed. It is quite clear, that several of the clauses in the 6 Geo. 4, were meant to have a retrospective effect, and in *Churchill v. Crease*, Lord Chief Justice *Best* said (b), “unless the expression, “*payments made*,” does not refer to payments at the time of the passing of the act, the words, “*or which hereafter shall be made*,” would be altogether nugatory; and, therefore, it would be absurd to say, that the Legislature did not contemplate all payments really and *bond fide* made at the time of the passing of the act, or, that such payments only were to be protected, which were to be made after it

(a) 4 Bing. 212.

(b) 2 Moore & Payne, 421.

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came fully into operation;" and, Mr. Justice *Park* said (a), "that the words, *all payments made*, or *which hereafter shall be made*, were extremely strong, if not conclusive, to shew that the Legislature intended to protect all payments actually made at the time of the passing of the act:—that all payments *made*, must be considered to refer to payments *theretofore made*; and more particularly so, as they were followed by the words, or *which hereafter shall be made*." That is the true construction, and the word "made," contrasted with "hereafter to be made," can only have a retrospective view, and was intended to operate disjunctively, and to apply to all *bond fide* payments made before and at the time of the passing of the act. Although the main object of the Legislature was, that the act should operate prospectively, yet the Court put the right construction on the 82nd section, in *Churchill v. Crease*; and the words of it must be construed according to common parlance, and not with a technical or legal accuracy; and, if so, there is no distinction to be drawn between a payment made and commission sued out before the passing of the act, or a payment between the time of its passing and the day on which it came into operation, and a commission sued out after that day.

Mr. Serjeant *Wilde*, in reply.—In *Churchill v. Crease*, the assignees had no existing rights at the time the statute was passed, as the payment was not made, or the commission issued until afterwards; and the Legislature did not intend to interfere with, or destroy the rights of assignees under a pre-existing commission. The 82nd section contains a general and not a specific enactment, and the Court are not bound to give it a retrospective operation.

Lord Chief Justice *BEST*.—I am extremely happy that

(a) 2 Moore & Payne, 424.

this question has been brought before the Court on a special verdict, as, if I am in error, it may be corrected by a higher tribunal. But I still entertain the same opinion I expressed in *Churchill v. Crease*, the facts of which are not distinguishable from the present; and if we were to hold that the plaintiff is entitled to recover, we should overturn our decision in that case. It has been admitted, in the course of an excellent and pertinent argument, that the provisions of a statute cannot have a retrospective or *ex post facto* operation, unless declared to be so by express words or positive enactment. To that proposition I fully accede; but I am of opinion, that there are words in the 82nd section, which clearly shew it to be retrospective, and that sense cannot be made of them, unless such a construction be put upon them; although it has been ingeniously stated by my brother *Wilde*, that, under the particular circumstances of this case, we ought not to give a retrospective effect to that clause, as the payment was not only made by the bankrupt to the defendants, but the commission was sued out before the statute 6 Geo. 4, c. 16, was passed. But, the words of the section are, "that all payments really and *boná fide made*, or which *shall hereafter be made* by any bankrupt, or by any person on his behalf, before the date and issuing of the commission against such bankrupt, to any creditor of such bankrupt, (such payment not being a fraudulent preference of such creditor), shall be deemed valid, notwithstanding any prior act of bankruptcy by such bankrupt committed; and such creditor shall not be liable to refund the same to the assignees of such bankrupt, provided the person so dealing with the bankrupt had not, at the time of such payment by or to such bankrupt, notice of any act of bankruptcy by such bankrupt committed;" and, here, it is found as a fact, that, when the defendants received the sum from the bankrupt, which his assignee seeks to recover in this action, they did not know that he had

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committed any act of bankruptcy. Now, what meaning can be given to the words, "*payments really and bond fide made*," unless they be taken to refer to payments made at the time of the passing of the act, and, consequently, all payments previously to that time would be equally protected. That was the ground of my opinion in *Churchill v. Crease*; and I there said, that (a), "unless the expression, *payments made*, does not refer to payments at the time of the passing of the act, the words 'or which *hereafter shall be made*,' would be altogether nugatory; and, therefore, that it was absurd to say, that the Legislature did not contemplate all payments really and *bond fide* made at the time of the passing of the act, or that such payments only were to be protected which were to be made after it came fully into operation." In *Maggs v. Hunt*, the act of bankruptcy was committed after the statute was passed, but, as it was not in force, it was held, that a commission founded upon such act, and sued out after the statute had come into operation, could not be supported, as there had been no new or intervening act of bankruptcy between the time of the passing of the act, and the day it came into operation. Although the words of the 82nd section are ambiguous, yet, if we do not give it a retrospective meaning, it would be altogether unintelligible; and, it is quite clear that several of the clauses of the act were intended to have an *ex post facto* operation. The 135th section does not appear to me to affect the 82nd, as far as regards the payment in question, as it only makes a subsisting commission valid as against the bankrupt, and he cannot dispute it; but, it does not follow that the assignees have such a vested interest in them as to be extended so as to affect the rights of third persons; their remedy, if any, is against the bankrupt himself.

(a) 2 Moore & Payne, 421.

Mr. Justice PARK.—I do not see any reason to induce me to alter the opinion I formed in *Churchill v. Crease*. Several of the sections of the late statute are framed in the most ambiguous terms; and it is not to be wondered at, that the Courts have experienced great difficulty in giving them a true or legal construction. But it appears to me, that the words *payments made*, in the 82nd section, coupled with those *hereafter to be made*, must have partly a retrospective, and partly a prospective operation, and that the Legislature meant, that the word *made* should apply to payments before, and at the time the statute was passed; and those *hereafter to be made*, to payments after the passing, or subsequently to its coming into operation.

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Mr. Justice BURROUGH.—I agree with my Lord Chief Justice and my brother *Park*, and think that they put a true construction on the 82nd section, in *Churchill v. Crease*. Although I did not there express my opinion on the point, I entertained no doubt, and the Legislature seem to have pointed out the distinction by contrasting the words *payments made*, with those *hereafter to be made*; and the former must, of necessity, apply to payments made before and at the time of the passing of the act.

Mr. Justice GASELEE.—I also concurred with the Court in *Churchill v. Crease* as to the construction of the clause in question, and I think the opinion we there formed is correct; and although a distinction has been taken by my brother *Wilde*, between commissions sued out before, and after the passing of the act, I think it is not well founded, and therefore, it ought not to prevail.

Judgment for the defendants.

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After the execution of a charter-party, the plaintiff, who was a party to it, entered into an agreement with the attesting witness, by which the latter was to have a share of the profits expected to be derived from the adventure. The witness having refused to release his interest:—
Held, that he was incompetent to prove the execution of the charter-party, and that evidence of his handwriting was inadmissible.

Hovill and Another v. STEPHENSON and Another.

THIS was an action of covenant on a charter-party, and brought by the plaintiffs, as ship owners, against the defendants as freighters, for non-payment of freight.

At the trial, before Mr. Justice *Park*, at *Guildhall*, at the Sittings after the last *Michaelmas* Term, the plaintiffs called the broker who prepared the charter-party, and who was also the attesting witness, to prove its execution; and, on his being asked by the defendants' counsel, whether he had not, since the instrument was executed, entered into an agreement with the plaintiffs, to receive a share of the profits which were expected to arise from the adventure, he admitted that he had, and that such agreement was in writing; and, having refused to release his interest, it was objected that he was not competent to prove the execution of the charter-party, as he was interested in the event of the suit. The learned Judge, considering the objection to be well founded, rejected his testimony.

Evidence was then offered to prove his handwriting, which being also objected to, the learned Judge refused to receive, and the plaintiffs, being unable to prove the execution of the charter-party, were nonsuited.

Mr. Serjeant *Taddy*, in the last Term, obtained a rule *nisi*, that this nonsuit might be set aside, and a new trial granted, on the grounds that the testimony of the witness had been improperly rejected; or, that at all events, evidence of his handwriting ought to have been received. Where a subscribing witness is dead, proof of his handwriting has been held to be sufficient. So, if some degree of interest has accrued to a party attesting the execution of an instrument, subsequently to such execution, proof of his handwriting is not only admissible, but is the next best evidence which can be given to prove the execution. The defendants might, if they

had pleased, have cross-examined the witness; but as they rejected his testimony altogether, the plaintiffs had a right to give secondary evidence of the execution of the charter-party, by proving his handwriting, particularly, as all the parties consented that he should be the attesting witness at the time of such execution; and, as the plaintiffs could not establish that fact, without his aid, it would be a failure of justice if he be deemed incompetent to prove it. In *Squire v. Bell* (a), the subscribing witness was interested in the instrument, at the time of the attestation, and therefore could not be examined to prove its execution. But, in *Goss v. Tracy* (b), the depositions of a witness disinterested at the time of making them, were allowed to be read in the cause in which he was afterwards plaintiff. In *Godfrey v. Norris* (c), in debt on bond, the subscribing witness having afterwards become the administrator of the obligee, proof of his handwriting was allowed. In *Buckley v. Smith* (d), where the attesting witness to a promissory note, became incapacitated, Lord *Kenyon* admitted proof of her handwriting; and, in *Bent v. Baker* (e), the case of *Barlow v. Vowell* (f) was cited, and approved of by Lord *Kenyon* (g), where it was ruled by Lord Chief Justice *Holt*, that, where a person makes himself a party in interest, after a plaintiff or defendant has an interest in his testimony, he cannot by this deprive them of the benefit of his testimony.

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Mr. Serjeant *Wilde*, on a former day in this Term, shewed cause. Although the broker who was the subscribing witness to the charter-party, was the most likely person to furnish every information as to what was said or done by the parties at the time of the execution of that instru-

(a) 5 Term Rep. 371.

(b) 1 Peere Wms. 288.

(c) 1 Str. 34.

(d) 2 Esp. Rep. 697.

(e) 3 Term Rep. 31.

(f) Skin. 586.

(g) 3 Term Rep. 34.

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ment; yet, as he afterwards derived an interest by the act of the plaintiffs, who sought to call him as a witness on their behalf, his testimony was properly excluded, as he undoubtedly had an immediate interest in the event of the suit; and it is clear that he thought so himself, as he refused to release it. The defendants ought not to be placed in such a situation as to be compelled to submit to a witness being called for the plaintiffs who has an interest in the cause. The plaintiffs themselves might as well be called; and, as the proposed witness was to participate in the fruits of the verdict, in case the Jury found for the plaintiffs, the latter must be considered as trustees for the witness; and, if proof of his handwriting were receivable, the defendants would be deprived of the benefit of cross-examining him. But, as the witness was interested in the event of the suit by the plaintiff's own act, after the execution of the charter-party, and might, in fact, be considered as a co-plaintiff, this case does not fall within either of the exceptions to the general rules, which allow the examination of certain interested parties as witnesses; or proof of their handwriting, to be received. In *Goss v. Tracy*, a case was cited, where the subscribing witness to a bond was afterwards made executor by the obligee:—in an action brought by him as such executor upon the bond, the Court allowed evidence to prove his handwriting to the bond, he being disabled himself to give evidence, as much as if he were dead. There, however, the witness became interested by the operation of law, *vis.* by having been appointed executor, and not by the act of the party who proposed to call him, as in this case. In *Godfrey v. Norris*, the attesting witness to the bond, became the administrator of the obligee, after the execution of the instrument, and therefore proof of his handwriting was allowed, as he had a right to pursue his interest in his character of administrator. In *Swire v. Bell*, the Court were of opinion, that the subscribing witness to the bond being interested as well at the time of his attestation, as

at the trial, he could neither be examined himself, nor would proof of his handwriting be sufficient; and that it was not like the case of a subscribing witness being afterwards appointed executor to the obligee, in which case proof of his handwriting might be given; and although the handwriting of the obligor was also proved in that case, Lord *Kenyon* said, that, on consideration of all the circumstances, the matter had better rest as it was. Although here, the party called as a witness, was not interested at the time of the execution of the charter-party, yet he afterwards became so by the act of the plaintiffs themselves. In *Honeywood v. Peacock* (a), in an action by the Sheriff on a bail-bond, the officer who made the caption was deemed a competent witness to prove the execution of the bond, on the ground that the defendant had requested him to attest the execution of the instrument, with full knowledge of the situation in which he stood; and, it was therefore held, that the defendant could not raise an objection to his testimony. In *Phillipps on Evidence*, it is said (b), that "if a deed or other written instrument is attested, but none of the witnesses are capable of being examined, the course then is, to prove an attesting witness's handwriting; and this will be a sufficient proof of the execution; as, where the attesting witness is dead, or blind, or incompetent to give evidence, either from insanity, or from infamy of character, or *from interest acquired after the execution of the deed*:" but the foundation must first be laid, by proving the situation in which the witness stands, and here the plaintiffs had agreed that the witness should have an interest by participating in the profits which might arise from the voyage, and for the recovery of which the present action was brought. Although the handwriting of a subscribing witness to a deed, who afterwards becomes a partner, and is, consequently,

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(a) 3 Camp. 196.

(b) 5th Edit. Vol. 1, 471.

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interested in the instrument, by acquiring a share in the concern, may be proved, yet this was not a general partnership between the plaintiffs and the witness, but the latter merely acquired an interest in the subject matter of the suit to which alone it extended, and by the result of which, he expected to derive a benefit. In *Forrester v. Pigou* (a), the first under-writer upon a policy, who had paid the loss upon an undertaking made to him by the assured, to repay the money, in case they failed in an action brought by them against a subsequent underwriter, was held not to be a competent witness. There, however, the defendant who called the witness, had not agreed that he should participate in the fruits of the verdict, and he had a right to the benefit of all the evidence he could obtain, in order to support his defence; whilst here, the interest acquired by the witness was derived from the plaintiffs themselves, who proposed to call him to prove the contract under which they expected to obtain a verdict, and on which alone they could be entitled to recover.

Mr. Serjeant *Taddy*, in support of his rule.—The plaintiffs did not attempt to conceal any thing that took place at the time of the execution of the charter-party; neither did they seek to prove the handwriting of the attesting witness, until his testimony had been rejected. Fraud on their part, has not even been suggested; and the object of calling the witness was, merely to prove the signatures of the respective parties to the instrument, and not the circumstances that transpired at the time of its execution. Although it has been said, that as the plaintiffs had given the witness an interest in the event of the suit, by their own act, they were prevented from calling him; yet it does not follow that his mind would be prejudiced, for all he was required to prove was, the execution of the charter-

(a) 1 Mau. & Selw. 9.

party. Lord *Mansfield* said, that the rules of evidence ought to be so moulded as to meet the necessity of each particular case; and here, manifest injustice would be done, if the plaintiffs should be debarred of all means of proving the execution of the instrument, under which alone they were entitled to recover from the defendants the freight due. It has been admitted, that proof of the handwriting of a party who has attested a deed, may be received, if he afterwards becomes a partner with a person suing upon it. If so, there can be no valid objection why such proof should not be received, where the party merely becomes a partner in a particular transaction, or to a limited extent. In *Godfrey v. Norris*, the plaintiff was the administrator of the obligee, and the only surviving witness to the bond on which the action was brought; and, on proof being offered of his handwriting, it was objected, (as here), that it was the fault of the plaintiff to bring himself under this incapacity, as he might have let another person have taken out administration for his use, or administration *quoad* the bond in suit only:—But Lord Chief Justice *Parker* ruled that proof of the handwriting of the plaintiff, was good evidence, and he likened it to the case of a will, where the witness happens to be a devisee under the will, in which case, if there be no other witness, proof of his handwriting is allowed. In *Buckley v. Smith*, the party who sued on the note, had married the witness who attested it; and Lord *Kenyon* admitted proof of the handwriting of the maker, the subscribing witness being incapacitated from being examined, and there she was rendered an interested witness, by the act of the plaintiff himself. In *Swire v. Bell*, the party was admitted to prove the execution of the bond, he being considered as a mere instrumental witness; but, as it afterwards appeared, that he was interested, as well at the time of his attestation, as at the trial, the Court thought that he could neither be examined himself, nor that proof of his handwriting would be sufficient. In *Baines v. Trom-*

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powsky, Lord *Kenyon* said (a), "the case of *Swire v. Bell*, went on the ground that the subscribing witness was interested at the time of the execution, and also at the time of trial;" and Mr. Justice *Grose* said, "where there is a subscribing witness, the parties thereby agree that the proof of their handwriting shall be made through that medium." That was all the plaintiffs required in this case, which is altogether distinguishable from *Forrester v. Pigou*, as there, the defendant might prove the fact he wished to establish by other witnesses than the underwriters on the policy. Here, however, the execution of the charter-party, could be proved by the subscribing witness alone.

Cur. adv. vult.

Lord Chief Justice *BEST*, now delivered the judgment of the Court as follows:—

This was an action upon a charter-party. At the trial, before my brother *Park*, it appeared that, after the execution of the instrument, the attesting witness entered into an agreement with the plaintiffs, by which he was admitted to a share of the profits which the plaintiffs expected to derive from their bargain. Upon this, an objection was taken to the competency of the witness, and his evidence was rejected, he having refused to release his interest. It was then proposed to prove his handwriting, which was also objected to, and the objection allowed; and the plaintiffs, not being able to prove the charter-party, were nonsuited. A motion was made in the last Term, to set aside this nonsuit, against which, cause was shewn on a former day in this Term. My brother *Burroughs*, was absent during the argument, but the rest of the Court think that this evidence was properly rejected. There are several cases where a subscribing witness has acquired an interest after the execution of an instrument attested by him, in which it has been decided, that proof of his hand-

(a) 7 Term Rep. 267.

writing may be received to establish such instrument; for instance, the handwriting of a subscribing witness who has been appointed an executor or administrator, or has married the person to whom the instrument was given, has been allowed to be proved. We do not dispute the authority of any of those decisions; on the contrary, we should be disposed to extend the principle established by them to the case of a man entering into partnership, and becoming interested in instruments, by acquiring a share in the credits, and taking upon himself the responsibilities of the firm of which he becomes a member. Necessity requires that in all these cases, such evidence should be received; as, otherwise, parties must lose the rights secured by the instruments attested, or forego the accepting of situations which might be most important to their welfare. It would be a great hardship, if the law were to say, that a man should not become an executor or administrator, or accept a beneficial partnership, without giving up his right to debts due to the estates in which he has acquired an interest. But, in the present case, the witness had only obtained an interest in the contract arising under the instrument which he was called on to prove, and that interest he derived immediately from the plaintiffs themselves, who proposed to call him. They, therefore, cannot complain that their witness is disqualified, when they have been the cause of his disqualification. That the interest was considered by the witness to be so valuable, as to be likely to affect his testimony, is evident by the circumstance that he refused to release it. It would be improper to allow a plaintiff to give such an interest to a person in the particular transaction in which he is obliged to call him as a witness, as is likely to bias his testimony. A learned writer (*a*), who has devoted too much of his time to the theory of jurisprudence to know much of the practical consequences of the doctrines he has published to the

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(*a*) Mr. Jeremy Bentham.

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world, has said, that interest should only operate against the credit, and not be a ground of objection to the competency of a witness. This doctrine, however, is contrary to our law, according to which, a direct interest to the smallest amount, in any person, will prevent him from being examined as a witness. This rule, does not stand upon the principle that Mr. *Starkie* supposes, viz. that there is no difference, or that the law can make no distinction between the degrees of interest (a):—but, upon this, that if the party declines to release his interest, whatever may be its amount, it seems that he considers it to be of importance to him, and therefore he ought not to be trusted as a witness in a suit instituted for the recovery of a sum in which he has an interest. A feeling of interest, will, in spite of the utmost efforts of the most conscientious man, often so warp his mind, as to prevent him from giving an accurate account of any transaction in which he is himself concerned. Considering the interest of parties, and that which is of still more importance, the interests of the public and of religion, which require that every possible means should be used to prevent false evidence, the law cannot be now too strict in excluding the testimonies of interested witnesses. It is true, that prejudices will frequently operate upon and influence the mind of a witness, as much as interest; but this is an evil that cannot be remedied. If we want the testimony of witnesses, we must be content to take it subject to all the defects that the infirmities of those who give it may occasion. We may require a witness to release his interest; but we cannot compel him to release himself from his prejudices; but, because we cannot do all we wish, we should not fail to do all we can, to arrive at truth. The case of *Forrester v. Pigou*, is stronger than this, for there the plaintiff gave the witness an interest after the cause of action accrued, without the privity of the defendant; and

(a) See *Starkie* on Evidence.

yet the Court would not allow the defendant to call him. If a plaintiff, in such a case as this, had a right to say that he must either be allowed to call a witness to support his claim, whom he himself had rendered interested, or be allowed to prove his handwriting, it would put the defendant under the necessity of having a case proved against him by an interested witness, or giving up the opportunity of obtaining a knowledge of any circumstances that occurred at the time of the execution of the instrument, by the cross-examination of the attesting witness. The rule for setting aside the nonsuit must, consequently be

Discharged.

JONES v. BRIGHT and Others.

Monday,
May 25th.

THIS was an action on the case in the nature of deceit on the sale of copper to the plaintiff by the defendants, for the purpose of sheathing the bottom of a vessel. The declaration contained twelve counts. The first six alleged a deceit on the sale, and the six last were for a breach of the warranty of the copper. The *tenth* count was, in substance as follows:—

That the plaintiff, at the special instance and request of the defendants, bargained with the defendants to buy of them, and the defendants agreed to sell to the plaintiff divers, to wit, one thousand sheets of copper, for the purpose of sheathing the bottom of a certain bark or vessel, called the *Isabella*; and the defendants, by falsely and fraudulently warranting the said sheets of copper, *which had been made and manufactured by the defendants, to be reasonably fit and proper for the purpose aforesaid*, sold the said sheets of copper to the plaintiff, at and for a large sum of money, to wit, the sum of 313*l.* 3*s.*, which

is, in an action on the case in the nature of deceit, although no fraud was imputed to the defendant; for that, as he manufactured the copper and knew the purpose to which it was to be applied, and said, "he would supply the plaintiff well," it amounted to a warranty that it should be fit for that purpose.

Where a person manufactures an article, and sells it for a particular purpose, the law implies a warranty that it is fit and proper for that purpose:—therefore, where the defendant supplied copper sheathing for the plaintiff's vessel, which turned out to be defective in a short time after it was used, and the Jury found that the decay was occasioned by some intrinsic defect in the quality:—*Held*, that the plaintiff was entitled to recover damages.

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was afterwards paid by the plaintiff to the defendants for the same: whereas, in truth and in fact, the said sheets of copper, were not, at the time of the said warranty and sale thereof as aforesaid, reasonably fit or proper for the purpose aforesaid; but, on the contrary thereof, the said sheets of copper, were, at that time, of an inferior quality, and wholly unfit and improper for the purpose aforesaid, whereby the said sheets of copper afterwards, to wit, on &c., at &c., became and were greatly corroded, injured, and destroyed, and of little or no use or value to the plaintiff; and so the defendants, by means of the premises, falsely and fraudulently deceived the plaintiff on the sale of the said sheets of copper as aforesaid.

The *eleventh* and *twelfth* counts were the same as the *tenth* in substance, the one omitting the name of the vessel, and the other that the copper had been made and manufactured by the defendants.

At the trial, before Lord Chief Justice *Best*, at *Guildhall*, at the Sittings after the last Term, it appeared, that the plaintiff was a ship-owner, and the defendants extensive manufacturers and vendors of copper; and, as the plaintiff admitted that no fraud or deceit had been practised by them, the first six counts were abandoned, and the cause proceeded solely on the breach of warranty. A witness, of the name of *Fisher*, a sail maker, said, that he knew the plaintiff and the defendants; that the plaintiff was the owner of the *Isabella*, and that he told the witness he wanted some copper to sheath her. That the witness went with the plaintiff to the defendants' counting-house, and introduced them to each other by saying, "Mr. *Jones* (the plaintiff) is in want of copper for sheathing a vessel, and I have pleasure in recommending him to you, knowing you will sell him a good article;" on which, *Smith*, one of the defendants, said, "your friend may depend on it, we will supply him well;" and that the price and time of credit were then agreed on. The plaintiff

then proved, that his shipwright afterwards went to the defendants' warehouse, and selected sheets of copper, which were sent to *Bristol* on the plaintiff's account, where the *Isabella* was then lying, and with which she was sheathed. The invoice was dated in *January*, 1827, and described the article sold, as sheets of copper, and nails, for the ship *Isabella* amounting to 353*l.* 15*s.* 6*d.* "Credit, six months." The price charged, was the market price for the best merchantable copper. It was then proved, that the *Isabella* proceeded on a voyage to *Sierra Leone*, from whence she returned in *November*, 1827. That when she sailed from thence, which was about five months after she was sheathed, it was discovered, that the copper was corroded and full of holes, and unfit for further use.

Witnesses were then called to prove, that copper employed in sheathing vessels, usually lasts from four to five years: and a mineralogist, who had assayed the copper in question, stated, that it contained more oxygen than it ought:—that copper readily embodies oxygen, but that it might be prevented by care in the manufacture; and that the defect in the defendants' sheathing might be attributable to the overheating of the copper, as well as to its having imbibed too great a quantity of oxygen.

For the defendants, several witnesses were called, who stated, that the corrosion of copper might be occasioned by a variety of extrinsic causes. That it decays sooner in some climates than in others. That the holes in the sheathing in question might have been produced by barnacles when the ship lay in the river at *Sierra Leone*, where they abounded. That the quality of copper might be easily ascertained by its appearance and malleability; and, it was contended, that, if there had been any defect in the copper sold to the plaintiff, his shipwright must have discovered it when he sheathed the vessel.

His Lordship left it to the Jury to say, whether the de-

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cay in the copper arose from intrinsic defect, or from an extrinsic cause; and that if it arose from intrinsic defect, whether such defect was occasioned by the want of skill in the manufacture, or from the use of improper materials.

The Jury found that the decay was occasioned by some intrinsic defect in the quality of the copper, but that there was no satisfactory evidence to shew how that defect was occasioned, or to what cause it might be attributed. A verdict was accordingly entered for the plaintiff, the amount of the damages to be referred to an arbitrator; leave being reserved to the defendants to move to set aside the verdict and enter a nonsuit, in case the Court should be of opinion that neither of the counts in the declaration was supported by the evidence.

Mr. Serjeant *Ludlow*, on a former day in this Term, obtained a rule *nisi* accordingly; and submitted, that, as the plaintiff had acquitted the defendants of any intent to deceive or defraud him on the sale, and as there was no evidence of an express warranty, the defendants could not be deemed responsible for the quality of the copper supplied; neither could a general warranty be implied in law, from one of the defendants' merely saying, that the copper should be fit for the particular purpose to which it was to be applied; and although the defect might be attributable to its inherent quality, there was no proof that the defendants did not use the best possible care in its manufacture, or that the article was not composed of the best materials. The buyer and seller were both innocent parties; and, therefore, the rule of *caveat emptor* applies, and in the late case of *Gray v. Cox* (a), where the plaintiff declared in *assumpsit*, that, in consideration that he would buy a quantity of sheathing copper of the defendant, at a cer-

(a) 4 Barn. & Cress. 108; S. C. 6 Dow. & Ryl. 200.

tain price, the latter undertook that it should be good, sound, substantial, and serviceable copper; it was held, that this warranty was not proved by shewing a purchase of copper sheathing at the ordinary market price; no express warranty having been given: and here, for any thing that appears to the contrary, the copper was manufactured for general sale, and no warranty can be implied by the mere relation of buyer and seller.

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Mr. Serjeant *Wilde*, and Mr. Serjeant *Russell*, now shewed cause. The *tenth* count was clearly supported by the evidence, as the plaintiff alleged that the defendants warranted the copper which had been made and manufactured by them to be fit for the purpose to which it was to be applied, *viz.* the sheathing the bottom of a vessel. The witness *Fisher*, expressly proved that the copper was required by the plaintiff, and sold by the defendants for that particular purpose; and, although it was not exhibited at the time of sale, the defendants ought to have taken care, and supplied what they knew was fit and proper for the purpose, and they alone had the means of knowledge, as they were the manufacturers. This case, therefore, differs from *Gray v. Cox*, as there the defendants were merely copper merchants, and not manufacturers. Besides, the copper was not sold for a general purpose; and, if it were not fit for sheathing, it would be altogether useless to the plaintiff. Although a general warranty may not be implied by law, yet, on the contract, as proved, a warranty arose by implication, that the copper should be reasonably fit for the purpose for which it was supplied. The intention of the parties must be looked at; and no precise words are necessary to create a warranty; and as the article supplied was manufactured by the sellers, the law will imply a warranty that it was reasonably fit and proper for the purpose to which it was to be applied. The sale was effected through the me-

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dium of a third person, who, on introducing the plaintiff to the defendants, said, that he knew that they would sell him a good article; to which, one of the defendants replied, that the plaintiff might *depend upon it that they would supply him well*. That was an adoption of the course of dealing that was to take place between them, and therefore, the rule of *caveat emptor* does not apply to the plaintiff, as he did not rely on his own judgment, nor is it to be supposed that a ship-owner is acquainted with the various properties of copper, whilst the manufacturer has a full knowledge of the article he has made, or, at all events, he ought to have such knowledge. There is no case similar to the present in circumstances; but the general doctrine applicable to it, is thus laid down by Mr. Justice *Blackstone* (a), “a second class of implied contracts, are such as do not arise from the express determination of any Court, or the positive direction of any statute; but from natural reason, and the just construction of law. Which class extends to all presumptive undertakings or *assumpsits*; which, though never perhaps actually made, yet constantly arise from this general implication and intendment of the Courts of judicature, that every man hath engaged to perform what his duty or justice requires.” Here, justice and expedience required, that, as the buyer did not inspect the article he purchased, and therefore could not protect himself against the loss he has experienced; the sellers should have furnished him with an article fit for the specific purpose for which it was ordered, and for which they charged their own price. No negligence can be imputed to the plaintiff, and the defect in the copper was not discovered until the vessel was about to return from *Sierra Leone*, and as the plaintiff had paid the full price for it, and the Jury found that the corrosion or decay was attributable to an intrinsic defect, their verdict is conclusive; and, if the plaintiff

(a) 3 Bl. Com. 162.

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had not paid for it, and the defendants had sued him for the price, it would be an answer to the action to shew that it was entirely unfit for the purpose to which it was applied, and for which specific purpose it was sold by the defendants. In *Chandelor v. Lopus* (a), where the declaration stated, that the defendant having skill in jewels, had a stone which he affirmed to be a bezoar stone, and sold it as such to the plaintiff; judgment was arrested, because it was not averred, that the defendant knew it *not* to be a bezoar stone, or that he warranted it to be one. At the time of that decision, great strictness was required in the allegation of a warranty; but the law has been since much relaxed in favour of the party deceived, and, particularly, since the introduction of the action of *assumpsit*. But that case cannot apply to the present, as the defendants were *the manufacturers* of the article supplied, from which a knowledge of its qualities must be implied. If underwriters insure on a ship;—a warranty that she was seaworthy at the time of effecting the insurance, must be implied. In the case of a life insurance, a warranty that the party whose life is insured, is labouring under no disease that may tend to shorten his life, is a condition precedent to effecting the policy. In the case of victuals supplied for a ship's crew, it must be implied that they are good and wholesome, and fit for the sustenance of man; that being the purpose for which they were supplied. So, here, although copper in sheets may be applied to a variety of purposes, yet it was expressly ordered for one specific purpose, *viz.* the sheathing the plaintiff's vessel; and it was impossible for him to know whether it would answer that purpose or not. Warranties on the sales of horses, or other animals, are easily distinguishable, as there, although the utmost care and diligence be used by the seller, he may not be able to discover a latent disease, but the manufac-

(a) Cro. Jac. 4.

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turer of copper can easily ascertain the quality of the ore, and watch it through the process of smelting, and may afterwards discover its defective qualities by causing it to be assayed. But, if a party applying to purchase a horse, tells the seller the purpose for which it is wanted, *viz.* to carry a lady, or a child, or to drive in a particular carriage, and it should turn out that the horse was vicious, or had never been in harness, the buyer would be entitled to recover, on proving that the horse was unfit for the purpose for which it was sold, although it might be fit for several other purposes. If a man be hired as a tutor, to teach the classics, or mathematics, although he did not say that he was qualified to do so, at the time of the hiring, yet, by his assenting to accept the situation, the law will imply that he could teach. In *Laing v. Fidgeon* (a), it was held, that in every contract to supply manufactured goods, however low the price, it is an implied term, that the goods shall be merchantable. In *Gardiner v. Gray* (b), where the defendant sold twelve bags of *waste silk* at ten shillings and sixpence per pound, which, on its arrival at its place of destination, was found to be of a quality not saleable under the denomination of *waste silk*, Lord *Ellenborough* said, "the purchaser has a right to expect a saleable article, answering the description in the contract. Without any particular warranty this is an implied term in every such contract. Where there is no opportunity to inspect the commodity, the maxim of *caveat emptor* does not apply. He cannot, without a warranty, insist that it shall be of any particular quality or fineness, but the intention of both parties must be taken to be, that it shall be saleable in the market under the denomination mentioned in the contract between them." Besides, the copper in question was supplied at the discretion of the sellers, and its quality could not be ascertained by the purchaser, at the time of the sale. This case, therefore,

(a) 4 Camp. 169; S. C. 6 Taunt. 108.

(b) 4 Camp. 144.

is distinguishable from *Fisher v. Samuda*, where Lord *Ellenborough* said (a), it was the duty of the purchaser of any commodity, immediately upon discovering that it was not according to order, and unfit for the purpose for which it was intended, to return it to the vendor, or to give him notice to take it back." There, however, the purchaser knew that the article was unfit to be sent to the place for which it was ordered; but he did not intimate it to the sellers before the season for exporting it was over, and when they might have lost the opportunity of disposing of it at home; and, in an action brought for its value, the purchaser did not, either in bar of the action, or in reduction of damages, object to the quality of the article, but allowed the seller to recover a verdict for the full price agreed upon. In *Okell v. Smith* (b), in *assumpsit* to recover the price of copper pans, which the seller engaged should be sound, and made of the best materials, and the purchaser, after trial, found that they were not sound, and would not answer the purpose for which they were intended, Mr. Justice *Bayley* said, "the plaintiff certainly is not entitled to recover the full price stipulated for by the contract, according to which, he was bound to furnish pans capable of answering the purposes for which they were ordered." Although in *Blutt v. Osborne* (c), where the plaintiff sold the defendant a bowsprit, which, at the time of the sale, appeared to be perfectly sound, but which, after being used some time, turned out to be rotten; it was held, that, in the absence of fraud, the plaintiff was entitled to recover what the bowsprit was apparently worth at the time of the delivery: yet, the language attributed to Lord *Ellenborough*, is inconsistent with the principle he first lays down, *viz.* "that a person who sells, impliedly warrants, that the thing sold shall answer the purpose for which it is

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(a) 1 Camp. 193.

(b) 1 Stark. Rep. 107.

(c) 1 Stark. Rep. 384.

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sold;" for he afterwards said, "what the plaintiff deserves, is the apparent value of the article, at the time of delivery." But that could not be so, as the bowsprit then appeared to be good and perfect in every respect, and consequently, the plaintiff was entitled to recover its real value. The case of *Jones v. Bowden* (a) does not apply, as the defendant was guilty of fraud, in re-packing sea-damaged pimento, and advertising it in catalogues, which did not notice that it was sea-damaged or re-packed; but he exhibited impartial samples of the quality at the sale. In that case, Mr. Justice *Heath*, mentioned a case tried before him (probably *Weall v. King* (b), which was an action of the sale of some lambs, sold as stock, and the evidence was, that, by the custom of the trade, *stock* were understood to be sheep that were sound, on which the learned Judge told the Jury that it amounted to an implied warranty that they were sound. In *Yeats v. Pim*, Lord Chief Justice *Gibbs* said (c), "where a party undertakes that he will supply goods of a certain description, he must execute his engagement accordingly." Here, it may be assumed, that the whole of the sheathing furnished to the plaintiff, was not copper, as it soon became corroded and unfit for use; and in *Bridge v. Wain* (d), where goods sold were described in the invoice as scarlet cuttings, Lord *Ellenborough* said, "that an undertaking that they were such must be inferred: that, to satisfy an allegation, that they were warranted to be of any particular quality, proof must be given of such a warranty, but that a warranty was implied that they were that for which they were sold." In *Pasley v. Freeman*, Mr. Justice *Buller* said (e), "it was rightly held, by Lord Chief Justice *Holt*, and has been uniformly adopted ever since, that an affir-

(a) 4 Taunt. 847.

(d) 1 Stark. Rep. 504.

(b) S. C. not S. P. 12 East. 452.

(e) 3 Term Rep. 57.

(c) 2 Marsh. 143.

ination at the time of a sale, is a warranty, provided it appear on evidence, to have been so intended." Although in *Prosser v. Hooper* (a), where the plaintiff bought saffron of an inferior quality, which, having kept six months, and sold part, he objected that it was not saffron; it was held, in an action for a breach of warranty, that, from the length of time, and inferior price given, it was such an article as the plaintiff meant to purchase; yet, the ground on which the Court decided was, that the terms of the contract were controlled by the acts of the plaintiff himself, in keeping the article, and selling part of it. Although the case of *Parkinson v. Lee* (b) may be relied on for the defendants, it is distinguishable from the present, as the vendors were not the growers of the hops, which had been damaged without their knowledge, and they were sold from samples fairly drawn, and the bulk was equal to the samples. There, too, the Court went into the question of intention between the parties, which was made the main feature of the judgment; and in *Gray v. Cox*, Lord Chief Justice Abbott said, at *Nisi Prius* (c), "the question is, whether the copper, so sold by the defendants to the plaintiffs, was fit and proper, or, in the language of the declaration, serviceable copper, for unless it were so, the plaintiffs were entitled to a verdict. Though the defects could not be discovered on the first inspection, yet they must have proceeded from something wrong in the manufacture, and the merchant may have his remedy against the manufacturer;" and his Lordship, in delivering the judgment of the Court, *in Banc* said (d)—"At the trial, it occurred to me, that if a person sold a commodity for a particular purpose, he must be understood to warrant it reasonably fit and proper for such purpose. I am still strongly inclined to adhere to that opinion." But, as the plaintiff declared on a general

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(a) 1 B. Moore, 106.

(c) 1 Car. & Payne, 187.

(b) 2 East. 314.

(d) 4 Barn. & Cress. 115.

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warranty, which did not arise, and could not be implied from the contract of sale; the Court directed a new trial.

Mr. Serjeant *Ludlow*, in support of his rule.—The verdict which the plaintiff has recovered, can only be sustained on the ground of an implied warranty, which cannot arise on the facts proved at the trial. It must be observed, that this is an action on the case in the nature of deceit, and a uniform series of decisions, from the earliest time to the present, shews, that the plaintiff, in such an action, must allege and prove, either an express warranty by the seller, or that he knew that the article he sold, was not such as he represented it to be, because, fraud and misrepresentation are the gist and essence of the action, and by which alone, the seller can be deemed liable. Lord *Coke* says (a), “by the civil law, every man is bound to warrant the thing that he selleth or conveyeth, albeit there be no express warranty; but the common law bindeth him not, unless there be a warranty, either in deed or in law; for *caveat emptor*,”—and that rule applies to all cases, unless there be fraud, or a known concealment of a latent defect by the seller, and the buyer can only recover *secundum allegatum et probatum*. Here, there is no pretence to say that there was an express warranty; and there was no proof that the defendants knew that there was any intrinsic defect in the copper, and the Jury so found, for they said, that there was no satisfactory evidence to shew what was the cause of the defect. If so, the *gravamen* is the breach of contract, which should be accurately stated, and there was no relation subsisting between the plaintiff and the defendants, as the manufacturers of the copper; the transaction related solely to their characters of buyer and sellers, and if so, the latter could only be liable for a breach of contract arising out of the

(a) Co. Lit. 102 (a).

sale. Although the plaintiff has alleged that the copper was made and manufactured by the defendants, he should have gone further, and stated, that they knew it was defective at the time of the sale; and, as it was not made to order, and the plaintiff's shipwright selected and inspected it before it was delivered, the defendants could not be liable as manufacturers, but as sellers only. If this verdict can be supported, the vendor of any manufactured article will be liable for any inherent defect of which he could have no knowledge, although he might have provided the best possible materials, and used every care and diligence in the manufacture. It was, at all events, incumbent on the plaintiff to shew, in an action of this nature, that the decay in the copper was attributable either to the bad quality of the article itself, or the negligence or want of skill in the workmen who manufactured it; neither of which was alleged or proved. In *Fitzherbert's Natura Brevium* (a), it is said, "if a man sell unto another man a horse, and warrant him to be sound and good, &c., if the horse be lame, or diseased, that he cannot work, he shall have an action upon the case against him; and so, if a man bargain and sell unto another certain pipes of wine, and warrants them to be good, &c., and they are corrupted, he shall have an action upon the case against him. But note; it behoveth that he warrant it to be good, and the horse to be sound, otherwise the action will not lie; for if he sell the wine or horse without such warranty, it is at the other's peril, and his eyes and his taste ought to be his judges." The *Year Book*, 26 Hen. 6, 35, is referred to as an authority to establish that principle. In cases of general dealing, between buyer and seller, there can be no implied warranty unless the latter has been guilty of fraud or deceit; and here, although the defendants sold the copper to the plaintiff, it was selected by his agent, and

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(a) Tit. "Writ de Trespass sur le case." Page 94, 8th Edit. 213.

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the sheets were not manufactured for the sole purpose of sheathing ships, but might have been applied to articles in domestic use, or to a variety of other purposes, and a shipwright may easily ascertain good copper, from its malleability, or, at all events, he ought to have known whether it was fit for sheathing when he applied it to the vessel in question. But the invoice is the only evidence of the contract, in which the article is not described as copper for sheathing, but merely as "copper for the ship *Isabella*." It must be admitted, that if a person about to purchase a horse of another, specifies the particular purpose for which he wants it, *viz.* to carry a child, or a timid person, or to drive in harness, and the seller says, he can recommend the animal as fit for such a purpose, it would amount to an express warranty. So, if a person supply a tailor with cloth, and desire him to make him a suit of clothes, it must be implied that he will make them to fit him; but, if a man purchase a suit ready made, the law of *caveat emptor* applies, and although the cloth may turn out defective or rotten, or made of bad materials, he can have no remedy against the seller. If goods are sold with an express warranty, the suspicions of the buyer are lulled; but if there be no warranty, and he has the power of inspection, and the goods are afterwards delivered in specie, the seller is no longer responsible. Here, the seller was as innocent as the buyer, and, it is quite clear, that there was no fraud or misrepresentation at the time of the sale. In *Schwyn's Nisi Prius* it is said (a), that in actions on the case, in nature of deceit on an implied warranty, which are grounded merely on the deceit, it is essentially necessary that the knowledge of the party, or, as it is technically termed, the *scienter*, should be averred in the declaration, and also proved; and the case of *Chandelor v. Lopus*, is referred to, in order to shew the necessity of the

(a) 3rd Edit. Vol. 1. 597.

avement, and although actions for the breach of an express warranty, closely resemble those in the nature of deceit on implied warranties, yet this distinction must be attended to;—that in the latter actions the *gravamen* is the deceit, and the gist of the action is the *scienter*, but in actions for breach of warranty, the *gravamen* is the breach of warranty, and where the plaintiff declares in *tort* for such breach, it is not necessary to allege the *scienter*, nor, if alleged, to prove it. *Williamson v. Allison* (a). In *Rolle's Abridgment* (b), it is said, if a “taverner sell wine (*knowing* it to be corrupt) to another, as sound, good, and not corrupt, without any express warranty, yet an action of deceit lies against him; for this was a warranty in law. So, if I come to a tavern to eat, and the taverner gives and sells me meat and drink, corrupted, whereby I am made sick, an action lies against him without any express warranty; for there is a warranty in law:” and the *Year Book 9 Hen. 6*, 53, is cited as an authority in support of that proposition. “But, if a man sell a horse to me, without warranting him to be sound, if he be distempered in his body, yet no action lies against him;” and although it is said, that the *Year Book 20 Henry 6*, 35, is to the contrary, yet, on reference to it, there is merely a *dictum* to that effect, by *Paston J.* and there the word *sachant* is introduced. In the old writs of deceit, *sachant* is always a material word. That the rule of *caveat emptor* applies to this case, there being no warranty at the time of the sale, is clear, from a number of authorities. In *Noy's Maxims*, it is said (c), “that a bargain is perfect by the delivery of the article bargained for, and *caveat emptor*;” and in *Wood's Institutes* it is said (d), “every one will affirm that his wares are good, that the horse which he sells is sound, yet if he does not *warrant* them to be so, though it was false, no action lies.” If a gene-

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(a) 2 East. 446.

(c) 6th Edit. p. 107.

(b) Action *disceit en nature d'un*

(d) 3rd Edit. p. 539.

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ral allegation of a warranty in a declaration can be supported by proof that the goods were sold for a particular purpose, the distinction between express and implied warranties will be at an end ; and, if the doctrine laid down by Lord Chief Justice *Abbott* in *Gray v. Cox*, can be supported to its full extent, every person who sells or manufactures an article, must warrant that it is fit and proper for the purpose for which it is intended; and if there be a latent defect, of which he was wholly ignorant, or which could not have been discovered at the time; still, he must be responsible, although the defect might not have arisen from want of skill in the manufacture, or the introduction of improper materials. If a person purchase a quack medicine, or buys articles at an auction where puffers are employed, he cannot complain that he has been imposed upon, although the article he purchased turns out to be of the most inferior quality, and though, at the time of the sale, it was declared to be made of the best materials. If the plaintiff had alleged that the defendants had not used good materials, or had been guilty of negligence, or want of care in the manufacture, the defendants would have proved the contrary; and, as the copper was not made to order, it was incumbent on the plaintiff to shew, either that it was composed of improper materials, or that there had been a want of skill in the manufacture, but which he failed to do. All the late decisions are in favour of the defendants; and although in *Bluet v. Osborne*, Lord *Ellenborough* said, that “ a person who sells, impliedly warrants, that the thing sold shall answer the purpose for which it is sold;” yet, he qualified that general remark by applying it to the facts of the case before him, for he proceeded to say, “ in this case the bowsprit was apparently good, and the defendants had an opportunity of inspecting it, No fraud is complained of, but the bowsprit turned out to be defective, upon cutting it up. I think that the plaintiff (the seller) is not liable on account of the subsequent failure.” So here, the copper was apparently

good, and the plaintiff not only had an opportunity of inspecting it, but his agent actually selected it; and, although there might have been an inherent defect, of which the defendants were ignorant, they cannot be deemed liable, as it might not have been within their power to prevent it. In *Fisher v. Samuda*, the beer was supplied for the purpose of exportation, and it did not appear that the purchaser had ever seen it; and no question arose as to the extent of the warranty. In *Okell v. Smith*, the copper pans were ordered to be made for a particular purpose, viz. the manufacture of vitriol; and in *Bridge v. Wain*, the plaintiff recovered on a count stating that the defendant undertook that the article sold was scarlet cuttings, and it was proved that the goods supplied were not scarlet cuttings. In *Laing v. Fidgeon*, the purchaser had merely a sample of the article sent to him, and which was furnished at a low price, as it was intended for exportation. Although in *Gardiner v. Gray*, Lord *Ellenborough* said, "where there is no opportunity to inspect the commodity, the maxim of *caveat emptor* does not apply; yet the plaintiffs recovered, because it appeared to be the intention, both of the buyer and seller, that the article should be saleable in the market under the denomination mentioned in the contract between them, and in the sale note the article was described as *waste silk*, but was found to be not saleable under that denomination. But the case of *Parkinson v. Lee*, is not only a leading authority, but expressly in point for the defendants. There, the second count of the declaration stated, that the defendant promised to deliver to the plaintiff, good, sound, and merchantable hops; and, it appeared, that the plaintiff paid a fair market price for good merchantable hops, but, as there was no fraud, the law would not raise an implied warranty that the hops should be merchantable; and that, although there was a latent defect then existing, but which was unknown to the seller, he was not answerable,

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although the hops turned out to be unmerchantable; and Mr. Justice *Grose* there drew the distinction and said (a), "if an express warranty be given, the seller will be liable for any latent defect, according to the old law concerning warranties. But if there be no such warranty, and the seller sell the thing such as he believes it to be, without fraud, I do not know that the law will imply that he sold it on any other terms than what passed in fact;" and Mr. Justice *Lawrence* said (b), "I know of no authority which makes the seller liable for a latent defect, where there is no fraud, and no representation was made by him on the subject to induce the buyer to take the thing."

Lord Chief Justice *BEST*.—It is the duty of Courts of justice in the administration of the law, to lay down rules calculated to prevent fraud; to protect persons who are necessarily ignorant of the quality of a commodity they may purchase, against those who *manufacture* and sell, and who are consequently, fully acquainted with the nature of such commodity, and to make it the interest of manufacturers, and those who sell goods on commercial credit, to furnish the best articles that can be supplied to their customers. These are the principles on which the Court must act, and, in this case, it has been admitted, that no fraud was attempted to be practised by the sellers on the purchaser. The action was brought by the plaintiff, to recover damages from the defendants for the bad quality or insufficiency of certain sheets of copper, which the plaintiff had purchased of them for a particular purpose, *viz.* the sheathing of a ship. It has been insisted, for the defendants, that the invoice is the only evidence of such a contract, and that they ought not to be bound by a loose conversation between them and the party who gave the order, and who introduced the plaintiff to them. To that I cannot accede. Very fre-

(a) 2 East. 321.

(b) *Id.* 322.

quently, an invoice is not sent until long after the contract has been completed, and in such a case, it can be no evidence of the contract. The invoice is not like a broker's note, which does contain, and is the only evidence of the contract between the parties. But, if we look at the invoice, we find, that the copper was sold for the use of the ship *Isabella*. However, I do not intend to narrow my argument to the terms of the invoice, but ground my opinion on the authority of a case not cited at the bar, in the course of the argument, *viz.* that of *Kain v. Old*, which was an action for the breach of a warranty of a ship, and where the Court of *King's Bench*, took time to consider; and Lord Chief Justice *Abbott*, in delivering the judgment said (a), "where the whole matter passes in parol, all that passes may sometimes be taken together, as forming parcel of the contract, though not always, because matter talked of at the commencement of a bargain, may be excluded by the language used at its termination." I concurred with the Court, in the decision in that case, and to the doctrine of which I still adhere. Whatever then, the Court may think was not previous discussion, but formed the ultimate part or termination of the contract, may be taken into consideration as to the terms and nature of the warranty. In a contract of this description, it is not necessary that the seller should say, "*I warrant*;" it is sufficient, if he says, that the article he sells is of a particular quality, or is fit for a particular purpose. Now let us look at the evidence. There was no doubt as to the credibility of the witness *Fisher*, who was a mutual acquaintance of both parties; and he stated, that when he introduced the plaintiff to the defendants, he said that the plaintiff was in want of copper for sheathing a vessel, and that one of the defendants said, "we will supply him well," and there was no evidence of any subsequent conversation

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(a) 2 Barn. & Cress. 634; and see S. C. 4 Dow. & Ry. 61.

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between either of the parties, to shew that what was said at that meeting, was not the principal ingredient of the bargain. From that a warranty may be implied; and the Jury found that the copper supplied, was not a good article; but that it contained an inherent defect. I do not wish to put this case on those narrow grounds, but to decide it on a broad principle; for I am clearly of opinion, that, if a man manufactures and sells the article he makes, he thereby warrants that it is merchantable, or that it is fit for some purpose; for, in *Laing v. Fidgeon*, it was decided, that, in every contract to furnish manufactured goods, however low the price, it is an implied term, that they shall be merchantable. If a party sell an article for a *particular* purpose, he thereby warrants it to be fit for such purpose, and there is no express decision to the contrary, although some *dicta* may be found which do not fully warrant such a proposition. We have been referred to cases touching the warranty of horses and commodities which are not the produce of human art. But there is a wide difference between a contract for the warranty of a horse, and a warranty of an article rendered saleable by the art of man. The owner of a horse may be ignorant of some latent defects in the animal, but a person may guard against defects in articles which he manufactures, by using an ordinary degree of care, and providing proper materials. This distinction explains the case of *Bluett v. Osborne*, where Lord *Ellenborough* held, that the defendant, who had sold a bowsprit to the plaintiff, might recover what it was apparently worth at the time of the delivery, as it then appeared to be sound, but which turned out to be rotten or defective when it was cut up. There, however, the seller did not grow the timber, he merely formed the bowsprit from it, after it was cut down and dried; but here, the defendants manufactured the copper in question, and they might, by due care, have guarded against its inherent defects by not allowing it to imbibe so much oxygen, by which it was ren-

dered soft and incapable of resisting the influence of salt-water. So, there is a wide distinction between a contract for the sale of an article in its natural state, and an article manufactured or rendered serviceable by human ingenuity. In the general sale of a horse, the seller only warrants it to be an animal of the description it appears to be, and nothing more; and if the purchaser make no inquiries as to its soundness or qualities, and it turns out to be unsound or restive, or unfit for use, he cannot recover as against the buyer, as it must be assumed that he purchased the animal at a cheaper rate. But if the purchaser asks for a carriage horse, or a horse fit to carry a lady or a timid and infirm person, the seller, who knows the qualities of the horse, on every principle of honesty, undertakes that it is fit for the purpose to which it was specified it was intended to be applied. So, where a conversation takes place between buyer and seller as to the quality of a particular article, if the latter say that it is good, it is an affirmation that it is of the quality he professes; and if it afterwards turn out not to be so, he is answerable for the consequences. In *Chandelor v. Lopus*, where the defendant sold the plaintiff, as a bezoar stone, a stone which was not a bezoar, Mr. Justice *Anderson* said, "that the deceit in selling it for a bezoar, whereas it was not so, was a cause of action." So, if the seller of an article warrant it to be of a particular quality, he does not comply with the terms of such warranty, unless the article turns out to be of such quality, as in the case of *Fisher v. Samuda*, where the plaintiff purchased beer from the defendants, to be shipped for and consumed at *Gibraltar*; the sale was an affirmation by the vendor that it was fit to be sent there. Whether or not an article has been sold for a particular purpose is a question of fact rather than of law, but if it be sold for such purpose, the sale is an undertaking that it is fit and proper. As to the system of quacking or puffing, to which allusion has been made, it ought not to be encour-

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raged, it is a mere trap to catch the unwary; and if, in an action for a breach of contract, it were shewn that the article puffed, although sold at a cheap rate, turned out to be of inferior quality, when asserted at the time of sale to be of the best materials and superior workmanship, I should hold that the seller was bound to take it back, or make a compensation to the buyer in damages. These principles lead me to decide the present case in favour of the plaintiff. But as it was said, at the trial, that the Court of *King's Bench* had formed a different opinion in the case of *Gray v. Cox*, I thought it unfit to decide the point at *Nisi Prius*, although I expected that the Jury would have found that the copper was not properly manufactured, as two scientific witnesses, who were called for the plaintiff, stated, that it was defective and of an improper quality, as sufficient care had not been taken to prevent its imbibing too large a quantity of oxygen, or distributing it equally over the whole surface, when in the act of smelting. It also appeared, that, at the time of the sale, there was a great competition among the manufacturers of copper, and that it was frequently sent into the market in a great hurry, and that the prices were lowered in consequence of such competition. Although the conduct of the defendants was most fair and honourable, as far as regarded the sale, yet the copper had suffered in the manufacture, either through the neglect of the workmen, or the hurried manner in which it went through the various processes. At all events, it turned out not to be equal to the purpose for which it was intended, nor was the plaintiff supplied well, as the Jury expressly found that there was an intrinsic defect in the quality of the copper, which was manufactured by the defendants, and which might have arisen from improper materials, or from neglect or want of skill in the manufacture. We have been referred to principles established by early authorities, and the case of *Chandelor v. Lopus* has been particularly mentioned, but

that does not appear to me to bear upon the question, as all that the Court there decided was, that, in order to render the seller liable, there must be either a warranty, or a false representation; but it does not follow that there must be an express warranty; an implied warranty would equally satisfy the terms of that decision. The same answer may be given to the authorities in *Rolle's Abridgment*, to which we were also referred; but it is most material to consider the more modern decisions, and see how they bear upon the question before us, and *Parkinson v. Lee* is a leading authority on the subject, although the express point was not there decided, as the Court only held, that a warranty that hops sold should be equal to sample, was satisfied by shewing that they were so, although they were not perfectly good or merchantable. *Expressio unius est exclusio alterius*; and as the hops turned out to be equal to the sample, the purchaser could not afterwards say that they were defective in quality. There, too, the article complained of was the production of nature, and its defect was unknown to the sellers; whilst here, the copper was manufactured by art and labour, and the defendants themselves were the manufacturers. In *Parkinson v. Lee*, Mr. Justice Grose said (a): "The question is, whether, in the case of a sale made under the present circumstances, there be any implied undertaking in law that the commodity be merchantable? The mode of dealing is, that the plaintiff buys hops from the defendant whom he knows *is not the grower*, by samples taken from the pockets, in which the commodity is close packed;" and he concluded by saying (b), "the defendant merely sold what he had before bought upon the same mode of examination." That case, therefore, only applies to a limited warranty, *viz.* that the bulk of the article sold should correspond with the sample. It was decided, in 1802, and although it was not referred to

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(a) 2 East, 321.

(b) Id. 322.

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in the argument in the case of *Laing v. Fidgeon*, which came before this Court in 1815, yet it cannot be supposed that Lord Chief Justice *Gibbs*, who then presided, was unacquainted with it, when this very point was decided. There, the plaintiff declared, that, in consideration that he would buy of the defendant divers goods at and for reasonable prices, to be paid for by the plaintiff, the defendant undertook to sell and deliver to the plaintiff such goods of a good and merchantable quality, and to charge a fair and reasonable price for the same:—it was proved, that the goods delivered were made of inferior materials, and were useless and unmerchantable, and the Court held, that, although there was no express contract that the articles should be merchantable, it resulted from the whole transaction, that the articles were to be merchantable, that the defendant (the seller) might have rejected the order, but having accepted it, he ought to furnish a merchantable article. The principle deducible from those cases appears to be, that, if a man sell goods generally, he undertakes that they are merchantable; and if he sell them for a particular purpose, he tacitly undertakes that they shall be fit and answerable for that purpose. Here, the copper was sold for the purpose of sheathing a ship, and it was proved that it was not fit for it. The plaintiff, therefore, is entitled to retain his verdict. The case embraces a question of great importance to the public. It will teach manufacturers their duty, and that they ought not to attempt to undersell each other by producing goods of an inferior quality, but to manufacture them fit for the purpose for which they are sold. It will also tend to protect the purchaser from imposition, who is necessarily ignorant of the nature of the article sold, whilst the person who manufactures it must, or ought to know its particular virtues and qualities.

Mr. Justice PARK.—Fully concurring as I do with the

sentiments expressed by my Lord Chief Justice, I beg to say that I entertain no opinion adverse to the character of the defendants. The Jury have found that there was an intrinsic defect in the quality of the copper, which might, and was, in all probability, occasioned by the neglect of those whom the defendants employed to manufacture it, as it is not to be assumed that it was worked by their own hands. But the principle on which I found my opinion, is the distinction between the manufacturer of an article and the mere seller. The tenth count, on which the Jury have found a verdict for the plaintiff, states, that he had bargained with the defendants to buy, and they had agreed to sell to him one thousand sheets of copper for the purpose of sheathing the bottom of a vessel; that the defendants, by falsely and fraudulently warranting the copper, which had been made and *manufactured* by them, to be reasonably fit and proper for the purpose aforesaid, sold it to the plaintiff for a large sum of money, which was afterwards paid by him for the same; whereas the copper, at the time of the sale, was wholly unfit and improper for the purpose, and became of little or no use to the plaintiff. Independently of the evidence of *Fisher*, which went to shew an express warranty by the defendants, is there not, as against the manufacturer, in a contract of this nature, where the purchaser cannot see or judge of the interior of the article, or know its inherent qualities or defects, and he buys it for a particular purpose, is there not, I ask, an implied warranty that the article is fit and proper for the purpose for which it is purchased? Here, it was proved that the sheathing should have lasted four or five years, whereas, it became corroded and altogether useless in the space of as many months. But, it has been said, that there is no case where there is not an express warranty, in which it is not incumbent on the purchaser to allege and prove that the seller *knew* that the article supplied was not such as he represented it to be; as, in an action on the case in the nature of deceit, the

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gravamen is the deceit, and the gist of the action is the *scienter*. But, in declaring on a warranty, it is sufficient to allege a breach in general terms, and it is impossible to know the nature of the warranty, or whether it be express or implied, but from the proof at the trial, and it will be then sufficient to shew that a warranty may be implied from the course of dealing between the parties. It is not necessary for me to go through all the cases which have been cited, but merely to refer to some of them, and which appear to me to establish a principle which will entitle the plaintiff to retain his verdict. The case of *Gray v. Cox* has been relied on, both for the plaintiff and the defendants; and Lord Chief Justice *Abbott* is reported to have said, at *Nisi Prius*, that (a), “where a commodity is sold for a particular purpose, it must be understood, that it is reasonably fit and proper for that purpose.” That is not to be considered as a mere *obiter dictum*, or a hasty or accidental opinion, for, although the other Judges appear to have differed from his Lordship after the case had been argued *in Banc*, yet, in delivering the judgment of the Court, he said: “At the trial, it occurred to me, that, if a person sold a commodity for a particular purpose, he must be understood to warrant it reasonably fit and proper for such purpose. I am still strongly inclined to adhere to that opinion, but some of my learned brothers think differently. Supposing, however, my opinion to be correct, still the plaintiffs have not declared on a warranty or promise of that nature, but upon a general warranty, and we are all of opinion that such a general warranty does not arise, nor can be implied in law from such a contract of sale as the present. For this reason we think, that the opinion expressed by me at *Nisi Prius* was incorrect:”—and the Court directed a new trial. There, too, the plaintiffs averred that the defendants undertook to furnish copper sheathing of a

(a) 1 Carr. & Payne, 186.

good, sound, substantial, and serviceable quality. No evidence was given of an express warranty, and the only proof was, that the plaintiffs ordered a certain quantity of sheathing, and paid a fair market price for it. But if the declaration in that case had been framed in the language of the tenth count, it is probable that the evidence adduced in support of it would have been deemed sufficient. In *Fisher v. Samuda* I was counsel for the plaintiff, who had paid for the beer after an action had been brought against him for the price, and after he knew that it was of a bad quality, for he discovered it to be so, and unfit for the purpose intended, in *July*, which was two months after the delivery, and yet he gave no notice to the seller to take it back till the month of *December* following; and in the action brought against him to recover the price, he did not either in bar, or reduction of damages, object to the quality of the article, so that Lord *Ellenborough* said, that the plaintiff must be presumed to have assented to its being of a good quality, and have acquiesced in the due performance of the contract on the part of the defendants. That case, therefore, does not appear to me to have any bearing upon the present. In *Laing v. Fidgeon*, the rule applicable to this case is laid down in the strongest possible terms, and the authority of that case has never been questioned. No Judge had more knowledge of commercial law than my Lord Chief Justice *Gibbs*, and he there concurred with the rest of the Court in holding, that, although there was no express contract that the article should be merchantable, it resulted from the whole transaction that the article was to be merchantable. In *Gardiner v. Gray*, Lord *Ellenborough* laid down the same rule, and said, "that a purchaser has a right to expect a saleable article, answering the description in the contract. Without any particular warranty, this is an implied term, in every such contract. Where there is no opportunity to inspect the commodity, the maxim of *caveat emptor* does not apply." That ap-

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pears to me to be very important, as far as regards this case. But it has been said, that the plaintiff might have had an inspection of the copper, but it was merely of its exterior; and even the shipwright who applied it to the vessel, had no means of knowing its intrinsic qualities at the time. It has been also submitted to us, by way of illustration, that, if a person order a suit of clothes from a tailor, and they are too small for him, the latter will not have fulfilled his contract; but that if he purchase them at a ready-made shop, the rule of *caveat emptor* applies; but, in *Okell v. Smith*, Mr. Justice Bayley said: "The plaintiff certainly is not entitled to recover the full price stipulated for by the contract, according to which, he was bound to furnish pans capable of answering the purposes for which they were ordered." And, in *Bluett v. Osborne*, Lord Ellenborough said: "A person who sells, impliedly warrants, that the thing sold shall answer the purpose for which it is sold." By deciding that the plaintiff is entitled to retain his verdict, we shall support the interests of commerce, and, if a manufacturer of an article represent it to be fit for the purpose for which it is required, the law will imply a warranty on his part that it is so.

Mr. Justice BURROUGH.—I also think that there is no ground to disturb this verdict. The question is rather a question of fact than of law, *viz.* whether the contract, as laid in the tenth count of the declaration, was proved at the trial. I am clearly of opinion, that it was. The witness *Fisher* stated, that the plaintiff told him, that he was in want of copper to sheathe a vessel; that the witness introduced him to the defendants, and told them the purpose to which the copper was to be applied; when one of them said, "we will supply the plaintiff well." The allegation in the declaration, that the copper was made and *manufactured* by the defendants, is distinct and positive, and was not introduced by way of parenthesis, or under a *videlicet*.

It formed part of the substance of the declaration, and if the plaintiff had not proved that the copper was manufactured by the defendants, he must have been nonsuited. The tenth count states in substance, that the defendants sold the plaintiff divers sheets of copper, for the purpose of sheathing a ship, which copper had been made and manufactured by them, and which they falsely and fraudulently warranted to be fit for that purpose. In the case of *The King v. Boyall* (a), an objection (among others) was taken after verdict, to an indictment against a parishioner for not sending out his carts to highway labour pursuant to an order from the overseers;—that two persons named in the indictment were not sufficiently alleged to be surveyors of the highways, as it was only averred that “they *being* surveyors, &c.,” without stating by whom, or when they were appointed:—but Lord *Mansfield*, held that “*being*,” was a sufficient averment. Here, it was alleged, that the copper was manufactured by the defendants, and therefore it was incumbent on the plaintiff to prove that they were the manufacturers. They knew for what purpose the copper was wanted, and the whole of the tenth count was proved, except the words “*falsely and fraudulently*,” and if the article furnished was not fit and proper for the purpose for which it was ordered, the allegation that they falsely warranted, was proved in substance; for it was shewn that the sheathing only lasted four or five months, whereas, it ought to have lasted as many years, and it was also proved that there was a defect in the manufacture. As, therefore, the copper was proved to have been bad, I think that this action was maintainable. The conversation that took place on the introduction of the plaintiff to the defendants, and which was proved by the witness *Fisher*, appears to me to amount to an express warranty on their part that the copper should be fit for the purpose for

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(a) 2 Burr. 832.

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which it was required. That is sufficient to sustain the tenth count of the declaration; and the finding of the Jury is conclusive to shew, that the decay in the copper was occasioned by some intrinsic defect in its quality.

Mr. Justice GASELEE.—As the points raised in this case have been so fully discussed, both by the Bar and the Bench, I shall merely make one or two observations, without going into the question, whether the warranty was an express or implied warranty. I fully agree with the doctrine laid down by Lord Chief Justice *Abbott*, in *Gray v. Cox*, that where goods are ordered and sold for a particular purpose, the law implies a warranty that they are fit for that purpose. That was taken for granted, in *Fisher v. Samuda*. There, it does not appear what the course of dealing was, but the plaintiff declared, that, in consideration that he had undertaken to buy of the defendant a certain quantity of beer, to be shipped for *Gibraltar*, the latter undertook to furnish and deliver good and sufficient beer for that purpose, and assigned for breach, that the beer was bad and wholly unfit to be shipped for *Gibraltar*. The plaintiff, however, allowed an action to be brought against him by the seller, to recover the price, in which action he did not object to the quality of the beer, but allowed the seller to recover a verdict for the full price agreed upon. But it has been said, that the verdict which the plaintiff has recovered in this case, cannot be sustained on either of the counts of the declaration; as they do not shew a sufficient contract of warranty. It appears to me, that the tenth count is properly framed, and it cannot be shewn on the face of the declaration, whether a warranty be express or implied. That fact can only be ascertained by proof, unless the warranty be in writing. As to whether the plaintiff might have been nonsuited, if he had not proved the defendants to have been the manufacturers of the copper, I do not take upon my-

self to say; but it appears to me to be a sufficient allegation that they did warrant the copper to be fit and proper for the purpose of sheathing a vessel. This is not like those cases where a promise must be in writing, and proved as laid. The declaration only states that the defendants *agreed* to sell the plaintiff copper for the purpose of sheathing a vessel; and, in *Read v. Nash* (a), it was held, that a promise to pay damages by a third person, in case the plaintiff would withdraw his record, need not be in writing, as it was not within the statute of frauds; and Lord Chief Justice *Lee* said (b), "the true difference is between an original promise, and a collateral promise; the first is out of the statute, the latter is not, when it is to pay the debt of another, which was already contracted." Here, although what took place between the parties at the time the contract was made, might not amount to an express warranty, yet enough was proved at the trial by the witness *Fisher*, from which a warranty may be implied; and as the promise by the defendants to supply the plaintiff well, was a promise originally made to him, it need not have been in writing; and parol evidence was properly received in proof of such statement. This rule therefore must be—

Discharged.

(a) 1 Wils. 305.

(b) Id. 306.

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Monday,
May 25th.

ASHBY and Another, Executors of ELIZABETH ASHBY deceased, v. ASHBY and LETT.

"Received of A. B. 150*l.*, which I promise to pay on demand, with interest," is a promissory note, and requires to be stamped as such. Where, therefore, an instrument in these words, on being produced in evidence, was stamped with a receipt stamp:—*Held*, that an acknowledgment by the defendant, that he owed the party to whom it was given, the sum mentioned in the note, was held sufficient to entitle the executors of the latter to recover on an account stated, although the consideration for which the note was given, was goods sold and delivered, for which there was no count in the declaration.

THIS was an action of *assumpsit* for money had and received. The declaration contained counts for money lent, money paid, money had and received, and on an account stated. Pleas—The general issue, and the statute of limitations.

At the trial, before Mr. Justice *Burrough*, at the last Assizes for the county of *Rutland*, it appeared that the plaintiffs were the executors of *Elizabeth Ashby* deceased, and they produced in evidence the following written instrument:—

"May 9th, 1816.

"Received of Mrs. *Elizabeth Ashby*, 150*l.*, which we jointly and severally promise to pay on demand, with lawful interest for the same."

This paper was signed by both the defendants, and their handwriting proved. The paper was impressed with a receipt stamp for 2*s.* 6*d.*; when it was objected for the defendants, that it was not receivable in evidence, as it ought to have had the stamp required for a promissory note, and which, by the statute 55 *Geo.* 3, c. 184, Schedule, Part 1, would have amounted to 4*s.* 6*d.*

The plaintiff then called a witness to prove, that the note was given to the testatrix for cattle sold by her to the defendant *Ashby*, and that *Lett* signed the note as surety for him. It was also proved, that the defendant *Ashby*, between two and three years after the note was given, had said, that 150*l.* was the whole money due upon it; and that, within six years from the commencement of this suit, he admitted that he owed Mrs. *Ashby*, the testatrix, 150*l.* without referring to the note. There was a memorandum on the note, from which it appeared, that only two years interest had been paid. It was further

objected for the defendants, that the plaintiff could not be entitled to recover, as there was no count in the declaration for goods sold, which was the only consideration for which the note was given, and that the count on an account stated, could only be proved by the note itself, which was not admissible, as it was not properly stamped. The Jury, however, found a verdict for the plaintiffs for the amount of the note and interest, leave being reserved to the defendants to move to set the verdict aside, and that a nonsuit might be entered, in case the Court should be of opinion that the plaintiffs were not entitled to recover on the count on an account stated.

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Mr. Serjeant *Jones*, on a former day in this term, accordingly obtained a rule *nisi*, and relied mainly on the last objection taken at the trial, that there was no evidence to support an account stated, but the note which the defendant *Ashby* had referred to, when he admitted the sum to be due.

Mr. Serjeant *Adams* now shewed cause.—Although the case of *Green v. Davies* (a), is decisive to shew that the instrument in question is a promissory note, and not admissible in evidence, as it was not stamped as such; yet, there was sufficient evidence of an acknowledgment of the debt due from the defendant *Ashby* to the testatrix, to entitle the plaintiffs to recover on an account stated, as the defendant said, that he owed her 150*l.*, without referring to the note in question; and that, coupled with the proof that two years interest had been paid, is sufficient to entitle the plaintiffs to retain their verdict. In *Wilson v. Kennedy* (b), it was held, that where a promissory note is void for want of a stamp, the plaintiff may go into evidence of the consideration for which it was given. The same point

(a) 4 Barn. & Cress. 235.

(b) 1 Esp. Rep. 245.

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was determined in *Wade v. Beasley* (a), and in *Manley v. Peel* (b), where a promissory note was given without a stamp, and the maker wrote upon it a memorandum of his having paid a certain sum for interest, Lord *Ellenborough* held, that such memorandum might be read as an admission that there was a principal sum due, which would yield so much interest. If, therefore, a note given for goods sold, be written on a wrong stamp, the party to whom it was given, may resort to his original demand, and give evidence of the consideration, or prove an admission of the debt by the maker, as evidence of an account stated. In *Green v. Davies*, although the defendant admitted that something was due to the plaintiff, still it did not appear what the nature of the debt was, or that it was one for which *assumpsit* could be maintained. Here, however, the defendant *Ashby* admitted that 150*l.* was due to the testatrix, without referring to the note, which is sufficient to support the count on an account stated.

Mr. Serjeant *Jones*, in support of his rule.—As the consideration for which the note was given, was cattle sold and delivered by the testatrix to the defendant *Ashby*, and there is no count in the declaration applicable to the original demand, the plaintiffs cannot be entitled to retain their verdict. The admission by the defendant *Ashby*, that he owed the testatrix 150*l.*, had reference to the note; and in *Castleman v. Ray* (c), where there was an acknowledgment of the drawee at the bottom of an unstamped draft, that a third person had paid the money mentioned in it for the use of the drawee, it was held, that such acknowledgment could not be received in evidence without giving effect to the draft. As, therefore, there is no count in the declaration applicable to the original cause of action, or the interest alleged to be due,

(a) 4 Esp. Rep. 9. (b) 5 Esp. Rep. 121. (c) 2 Bos. & Pul. 383.

and as the admission by the defendant as to the sum of 150*l.*, referred to the note, which is a nullity, the rule for entering a nonsuit must be made absolute.

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Mr. Justice PARK (*a*).—It is highly desirable that rules of law should be consonant to justice. The objections raised for the defendants, although feasible, are most unjust. It appears, that the note in question was given by the defendant *Ashby* for cattle sold to him by the testatrix, and that, through ignorance or inadvertence, it was written on a receipt stamp of the value of 2*s.* 6*d.*, instead of the stamp requisite for a promissory note, which would have amounted to 4*s.* 6*d.* That, however, ought not to defeat the plaintiffs of their just rights. But, if the law were decisive on the point, we must yield to it, however much we might regret it. But the Court are unanimously of opinion, that, as the defendant *Ashby* acknowledged in a conversation with a third person, within six years from the commencement of this suit, so as to bring the case within the operation of the statute of limitations, that he owed the testatrix 150*l.*, without making any reference to the note, or any other written security, it was sufficient to entitle the plaintiffs to recover on the count, on an account stated. We are extremely sorry that the declaration does not contain a count for interest; the verdict, therefore, must be reduced to 150*l.*, the amount of the note, and this rule must be

Discharged (*b*).

(*a*) Lord Chief Justice *Best* was at Chambers.

(*b*) In *Brown v. Watts*, 1 Taunt. 363, it was held, that if a bill of exchange, given in discharge of a debt, is rendered inadmissible, by being on an improper stamp, the plaintiff may prove his original debt; and, in *Farr v. Price*, in an action on a promissory note on

a wrong stamp, Lord *Kenyon* observed, (1 East, 58), that as there were other general counts in the declaration, if the plaintiff could give other evidence of a consideration paid by him to the defendant, he would not be concluded from recovering, by the fact of the defendant's having given an imperfect promissory note for it.

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Wednesday,
May 27th.

EVERETT v. DESBOROUGH.

The plaintiff being possessed of property determinable on the death of *A.*, was applied to by an agent of an insurance Company, to effect an insurance with them on the life of *A.*, to which the plaintiff agreed; but as he had never seen *A.*, he directed the agent to make the necessary inquiries respecting him. One of the conditions indorsed on the policy was, that a reference should be given to two persons respecting the state of health of the life to be assured, one of whom was to be his usual medical attendant. The agent of the Company applied to *A.*, who referred him to a medical man, who had never attended him as such, he having been visited by a quack doctor on his recovery from fits of intoxication, in which he frequently indulged:—*Held*, that *A.* was impliedly the agent of the plaintiff, and that he was bound by his mis-statement to the agent of the office, and, therefore, that it avoided the policy as against the plaintiff, although he was wholly unacquainted with *A.*'s mode of life, but, on the contrary, believed him to be a man of temperate habits.

THIS was an action of *assumpsit* against the defendant, the secretary of the *Atlas Insurance Company*, on a policy of assurance, effected for the plaintiff, on the life of one *James House*. The declaration stated, that on the 22nd *April*, 1828, the plaintiff caused to be made a certain policy of assurance, whereby, after reciting that he was desirous to effect an insurance with the *Atlas Company*, on the life of *House*, for the term of one year, from the 18th *April*, 1828; and, that the plaintiff had accordingly paid at the Company's office at *Warminster*, in the county of *Somerset*, 37*l.* 17*s.* 6*d.*, as a premium for such insurance for one year; three of the Directors of the Company, whose hands were subscribed to the policy, relying upon the truth of a certain declaration made by the plaintiff on the 22nd *March*, 1828, in compliance with the conditions on the policy indorsed, did agree with the assured, that they, the Directors, would, in case *House* should happen to die at any time within the term of one year, commencing from the said 18th *April*, pay out of the stock and funds of the Company, to the assured, within three months after the decease of *House* should have been notified to the Directors of the Company, the sum of 1,000*l.*; provided always, that the policy and the assurance thereby effected, should at all times and under all circumstances, be subject to such conditions and stipulations as were contained in the printed proposals indorsed thereon, in the same manner as if the same were wholly and actually repeated and adapted to the present case. The plaintiff then alleged the payment of 37*l.* 17*s.* 6*d.*, as a premium for the insurance of the said sum of 1,000*l.*; and, after averring mutual promises, in fact, said, that the decla-

and that he was bound by his mis-statement to the agent of the office, and, therefore, that it avoided the policy as against the plaintiff, although he was wholly unacquainted with *A.*'s mode of life, but, on the contrary, believed him to be a man of temperate habits.

ration in the policy mentioned, in compliance with the conditions thereon indorsed, was, and is, a certain declaration as follows, (that is to say):—

“I (the plaintiff), being desirous to make an assurance with the Directors of the *Atlas Assurance Company*, in the sum of 1,000*l.*, upon the life of *James House*, born at, &c., on, &c., but now residing at *Warminster*, in the county of *Somerset*, do hereby declare to the best of my belief, that the age of the said *James House* does not exceed forty-four years, that he has had the small pox, that he has not had the gout, that he has not suffered a spitting of blood, and that he is not, and has never been afflicted with asthma, or fits, or any other disorder which tends to shorten life. I do hereby agree, that this declaration shall be the basis of the contract between me and the Company; and that, if any untrue averment is contained in this declaration, in setting forth the age, state of health, or other circumstances, relative to the said *James House*, all monies which shall have been paid to the Company upon account of the insurance so made by me, shall be forfeited. Dated, &c.”

The plaintiff then averred, that in the printed proposals mentioned and referred to by the policy, it was expressed and declared, that persons proposing to effect life assurance would be required to state the following particulars, *viz.*, “name and residence of the party by whom the proposal was made;—name, residence, and profession of the person whose life was to be assured, and in case of an assurance upon survivorship, the name, residence, and profession of each party;—place and date of birth, and age next birth-day;—sum to be assured, and the term;—whether afflicted with gout, asthma, fits, spitting of blood, or any other disorder which tends to shorten life;—whether the party has had either the small-pox or cow-pox;—whether the party would attend personally, either at the office in *London*, or before one of the Company’s agents;—whether employed in the military or naval service;—the names and

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residences of two gentlemen to be referred to respecting the present and general state of health of the life to be assured—one to be the usual medical attendant of the party. A declaration as to all the above points will be considered as the basis of the contract between the assured and the Company. If the above declaration should not be in all respects true, then the policy would become void, and the premium that might have been paid, would be forfeited."

The plaintiff then averred, *that the declaration so referred to in the policy, and so made by him, was in all respects true.* That, on the 15th June, 1828, House died, and that his decease was duly certified to the Company, and proof of his death afterwards adduced; and that, although the plaintiff had in all things conformed himself to, and observed, performed, fulfilled, and kept all things in the policy, and conditions, and stipulations contained, on his part and behalf to be observed and performed, according to the form and effect of the policy, and of the said proposals and conditions; yet, that the defendant would not pay the plaintiff the said sum of 1,000*l.*, so by him insured as aforesaid, but altogether refused and neglected so to do.

Then followed the usual money counts. The defendant pleaded the general issue, and paid the amount of the premium into Court, upon the count for money had and received.

At the trial, before Mr. Justice Gaselee, at the last Assizes at Salisbury, the execution of the policy was proved, and certain conditions on the back of it, in the terms as set forth in the declaration, were declared to be a part of the policy, as much as if they had been repeated in the body of it.

For the plaintiff, a witness of the name of Lye was called, who stated that he was an agent of the Atlas Assurance Company, at Warminster, near which place the

plaintiff and *House* lived; that, as the witness knew that the plaintiff held a leasehold estate determinable on the death of *House*, he, the witness, applied to the plaintiff to effect an insurance on *House's* life, with the *Atlas* Company. That the plaintiff accordingly agreed to effect an insurance to the amount of 1000*l.*, but he told the witness, that, as he had never seen *House*, and knew nothing of his habits or mode of life, he, *Lye*, was to make the necessary inquiries respecting him. That *Lye*, who had known *House* from his childhood, accordingly called at his mother's near *Warminster*, where he had been residing for some months and managing her farm; that he appeared in full health, and that several of the inhabitants of *Warminster* told *Lye* that *House* was considered to be one of the healthiest men there; and that, during his stay with his mother, he had led a sober and temperate life. That *Lye* also called at a house in *Bath*, which was sixteen miles from *Warminster*, and where *House* had lived for some years previously to his going to his mother's. That, on *Lye's* asking *House* who his usual medical attendant was, he said, "I have never had occasion for a doctor, sometimes I have taken *Harvey's* quack pills, but Mr. *Vicary*, of *Warminster*, knows as much of me as any man." On Mr. *Vicary* being called as a witness at the trial, he stated that he was a surgeon and apothecary, practising at *Warminster*, that he had known *House* from his birth, and had attended different members of his family, but had never attended him professionally, and that he never saw a more robust or healthy man. A letter was then given in evidence from Mr. *Vicary* to the defendant, as Secretary of the *Atlas* Company, in which he described *House* as a strong, and apparently healthy man. There was also a letter addressed to the defendant by *Lye*, in which he stated that *House* had referred to Mr. *Vicary*, as his usual medical attendant; that he, *Lye*, shewed the declaration required by the policy, and which was in writing, to the plaintiff, and

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which occupied one half of the sheet of the written statement transmitted to the office by *Lye*, and was about to read it to the plaintiff, when he said, "I dare say it is all correct;" and, on the other half sheet, the plaintiff signed a separate declaration that he believed *House* had had the small pox, but had not had the gout, &c. &c., and was not afflicted with any disorder tending to shorten life, in the terms as set out in the declaration.

Several witnesses were called by the defendant on the part of the office, who proved, that, when *House* resided at *Bath*, he was much addicted to drinking; that sometimes he would be in a continual state of intoxication for a fortnight or three weeks together. That, when he became sober, he always sent for a Mr. *Harvey*, a quack doctor at *Bath*, who bled him copiously, and gave him strong laxative medicines. That, a short time before the insurance was effected, *House* left his mother's at *Warminster* and went to *Bath*; that he soon afterwards indulged in one of these fits of drunkenness, and, on his recovery, returned to his mother's at *Warminster*, where he died on the 15th *June*, 1828, being about two months after the policy was executed. It appeared, however, that neither the plaintiff nor *Lye*, nor any of the inhabitants at *Warminster*, knew of *House's* acts of intemperance at *Bath*, or that he had ever been attended by *Harvey*; and Mr. *Vicary*, on being recalled, said, that, shortly before the insurance was effected, he saw *House*, and that whatever his habits might have been before he came to reside with his mother at *Warminster*, they had produced no visible effects upon his person or constitution.

For the defendant, it was insisted, that the fact of the frequent intoxication of *House*, at *Bath*, as well as his having been attended there by *Harvey*, ought to have been communicated to the office; and that, at all events, they should have been informed of the name of *House's* usual medical attendant at *Bath*, particularly as he chiefly resided there; and that Mr. *Vicary*, at *Warminster*, could

not be considered as his *usual medical attendant*; and, therefore, that the conditions indorsed on the policy had not been complied with.

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For the plaintiff, it was submitted, that, by those conditions, he had only warranted against any disorder tending to shorten the life of *House*, and that drunkenness or intemperate habits did not fall within the terms of the conditions; that it was sufficient to entitle the plaintiff to recover on the policy, to shew that *House* was an insurable life at the time the insurance was effected. That *House* was not the agent of the plaintiff; and therefore that he ought not to be affected by any misrepresentation or suppression of any material fact, which he, *House*, ought to have communicated to *Lye*, who was not only the agent of the company, but induced the plaintiff to effect the insurance in the first instance; and as the plaintiff told *Lye*, that he did not even know *House*, but desired *Lye* to make the necessary inquiries respecting him, the office must be bound by *Lye's* acts; and the plaintiff was altogether exonerated from stating all the particulars the office might have required previously to the insurance, as *Lye* undertook to take that duty upon himself.

The learned Judge left it to the Jury to say—*First*, whether or not, at the time of effecting the insurance, *House* was an insurable life? *Secondly*, whether there had been a concealment of any circumstance which it was material for the Insurance Company to have known; and *Lastly*, whether *Lye* acted as the agent of the plaintiff, or of the Company, or of both?

The Jury found that *House* was an insurable life; that there was no concealment by him of any material circumstance from the Company, and that *Lye* was the sole agent of the Company: and they accordingly gave a verdict for the plaintiff for the amount of the sum insured. Leave, however, was reserved to the defendant, to apply to the Court to set aside the verdict and enter a nonsuit, in case

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they should be of opinion that there was a concealment by *House* to *Lye*, at the time he made the inquiry as to the person who was his usual medical attendant, and by which the plaintiff must be bound.

Mr. Serjeant *Merewether*, on a former day in this Term, accordingly obtained a rule *nisi*, and submitted, that *House* had not made a fair or proper representation of the state of his health and his habits of life at the time the inquiries were made by *Lye*, and that, at all events, he ought to have referred to Dr. *Harvey*, as his medical adviser, as he constantly attended him after indulging in his frequent and secret fits of intoxication. *Lye* was induced to believe that *House* was an insurable life, from his robust and healthy appearance, and the character he bore at *Warminster*. In *Maynard v. Rhodes* (a), where an insurance was effected on the life of a third person, by a creditor, and misrepresentations were made by the party whose life was insured, of the state of his health; it was held to vitiate the policy, although the creditor, for whose benefit the insurance was effected, was ignorant of the representations being false, and although the party did not die of the disease he was afflicted with at the time he made such representations. In *Morrison v. Muspratt* (b), where a female, on whose life it was proposed to effect an insurance, was represented to the office by a medical man as enjoying ordinarily a good state of health, and the insurance was effected accordingly; but it appeared, that, a short time previously, she had been seised with a pulmonary attack, and was attended by another medical adviser; and as those facts were not disclosed at the insurance office, this Court held, that the Jury ought to have been called on to consider whether the illness, and the attendance of the other medical man, ought not to have been disclosed to the insurers;

(a) 1 Carr. & Payne, 360; S. C. 5 Dow. & Ryl. 266. (b) 4 Bing. 60.

and that it was not sufficient to direct them generally to consider, whether or not there had been any misrepresentation. And in *Lindenau v. Desborough* (*a*), the Court of *King's Bench* held, that it is the duty of a party effecting an insurance on life, or on property, to communicate to the assurer all material facts within his knowledge, touching the subject-matter of the insurance; and that it is a question for the Jury, whether any particular fact was or was not material.

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Mr. Serjeant *Wilde* now shewed cause.—The plaintiff complied with the conditions indorsed on the back of the policy as far as he was concerned, and averred, that the declaration referred to in that instrument, and which was so made by him, was in all respects true. That declaration was to be considered as the basis of the contract between the assured and the Company. The conditions as to the description of the person whose life is to be insured are preliminary to the contract, and if the party effecting the insurance, or for whose benefit it is made, give an untrue statement, or answer falsely to questions put to him by the agent of the office, knowing such statement to be false, it must be admitted that it would avoid the policy as against him; but it was competent to the assurers to dispense with any of the preliminary inquiries, or they might require a full and satisfactory account of the habits of the party whose life was to be insured. Here, however, the agent of the Company merely required the plaintiff to declare whether *House* was, to his knowledge, afflicted with any disorder which tended to shorten life; and the agent took upon himself the responsibility of inquiring as to the person who was the usual medical attendant of *House*, and also as to his mode of life, or whether he was a man of intemperate habits which might tend to produce disease; and his being addicted to intoxication was merely a habit and

(*a*) 8 Barn. & Cress. 586; S. C. 3 Man. & Ryl. 45.

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not a disorder or disease. *Lye* was not the agent of the plaintiff, but the agent of the office alone, and he solicited the plaintiff to effect the insurance on the life of *House* in the first instance. The plaintiff was wholly unacquainted with him, and requested *Lye* to make the necessary inquiries respecting him; the office, therefore, must be bound by *Lye's* acts, and there was no evidence that the plaintiff knew the terms of the conditions indorsed on the policy, as *Lye* merely requested him to sign a declaration as to the age and disorders with which *House* had been afflicted within his own knowledge. It must, therefore, be assumed, that the office dispensed with the condition or declaration from the plaintiff as to the person who was the usual medical attendant of *House*, or that the Directors were satisfied with the representations made by *Lye* on that point. The policy was not executed until a month after the declaration by the plaintiff was made; and as it was considered to be the basis of the contract between the parties, the office should have taken care and made every necessary inquiry respecting the mode of life and occupation of *House*, particularly as it was wholly left to their agent to do so; and as the negotiation was carried on between him and the plaintiff before the policy was executed, the insurance office cannot afterwards raise an objection, or seek to avoid the instrument, on the ground that the plaintiff has not communicated to them information which they never called upon him individually to make. The office might have dispensed with the condition as to the place where *House* was born, and it must be now assumed that he gave *Lye* all the information he required as to his mode of life, and that the statement made by him was in compliance with the conditions indorsed on the policy, and which statement was transmitted to the office, together with another made by *Lye* himself, and in which he stated that *House* had referred him to his usual medical attendant, whom he named accordingly. A communication made by *House*, as *cestui que vie* to the agent of the Company, is altogether dif-

ferent from a communication made by the plaintiff himself as the assured. Besides, *Lye* was acquainted with *House*, and it was therefore incumbent on him to make the necessary inquiries, more particularly as the plaintiff requested him to do so, and told him that he had never seen *House*, and in fact knew nothing of him. Admitting, that if the plaintiff, or his recognized agent, had made a mis-statement, or suppressed, or concealed a material fact from the office, he must be bound by it; yet, *Lye*, as the agent of the Company, undertook to make the necessary inquiries. The plaintiff was altogether absolved from making any declaration as to the medical man who usually attended *House*, and, as he had never seen him, he was not the agent of the plaintiff. This, therefore, distinguishes the present case from those of *Lindenau v. Desborough*, *Morrison v. Muspratt*, and *Maynard v. Rhodes*. In *Lindenau v. Desborough*, the Court grounded their decision on the circumstance, that the assured had failed to communicate to the insurers, a material circumstance *within his own knowledge*, or that of his agent, *viz.* the state of the mental faculties of the party whose life was insured; and Mr. Justice *Littledale* said (a): "It is the duty of the assured, in all cases, to disclose all material facts within their knowledge." Here, however, the assured had no knowledge of *House*; and as the agent of the Company undertook to make the necessary inquiries as to his mode of life, they must be bound by it, and the plaintiff was consequently relieved from making any inquiries himself. In *Morrison v. Muspratt*, the assurance was effected by a husband on the life of his wife, and he introduced a medical man, who resided at a distance, and did not attend on the wife when the insurance was about to be effected; but she was then visited by another medical practitioner, who lived in the neighbourhood, and who ordered her diet to be regulated, as she had a cough and

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(a) 8 Barn. & Cress. 592.

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became emaciated, and had every symptom of a pulmonary attack; and as the husband must have been aware of her illness, he ought to have disclosed the name of the medical person who actually attended her; and as it was a most material fact, to which the attention of the Jury was not called, the Court directed a new trial. In *Maynard v. Rhodes*, the plaintiff was an annuity creditor of Mr. *Lyon*, on whose life the insurance was effected, and the parties were consequently known to each other; and previously to the execution of the policy, in answer to certain questions put to him by the office, he stated that he had no medical attendant, except a gentleman at *Chichester*, whom he named; and he further said, that he had never had a serious illness; whereas, it was proved, that, from the month of *February* to the month of *April*, 1823, Mr. *Lyon* had been attended by Dr. *Veitch*, a physician, and Mr. *Jordan*, a surgeon, on account of inflammation of the liver, a fever, and a determination of blood to the head, for which active medicines were provided, and leeches frequently applied, and yet Mr. *Lyon* did not communicate the nature of such disease, or the attendance of those medical gentlemen upon him, although he made his declaration to the office in *May*, 1823, and they had attended him from *February* to *April* preceding. That was a concealment of a most material fact. There, too, the assured was the agent of the party whose life was insured—whilst here, the plaintiff had never seen *House*, but requested *Lye*, as the agent of the office, to make the necessary inquiries respecting him. The plaintiff, therefore, could not know what conversation took place between them, or the nature of the communication *Lye* made to the office; and the Jury expressly found that he was the agent of the office alone—and, as he acted without the interference of the plaintiff, in making the inquiries as to *House's* habits of life, the office must be bound by his acts; and the declaration of

the plaintiff was consequently confined to facts within his own knowledge, *viz.* as to the age of *House*, and his not having been affected with certain diseases or disorders; and the declaration as to the person who was the usual medical attendant on *House*, was made by *Lye* alone, and the office acted on his representation, and caused the insurance to be effected accordingly; and, although frequent fits of intoxication might produce disorder or disease, yet it seems that they had produced no visible effect on the appearance or constitution of *House*.

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Mr. Serjeant *Merewether*, in support of his rule.—The misrepresentation made by *House* to *Lye*, as to the person who was his usual medical attendant, not only avoids the policy altogether, but the plaintiff must be bound by the consequences of such misrepresentation, as *House* was impliedly his agent, as the insurance was effected on his life, and he was bound to answer every inquiry made by *Lye*, as to the state of his health and the medical man who usually attended him. The case of *Maynard v. Rhodes* is expressly in point, where it was decided, that if misrepresentations are made by the party whose life is insured, as to the state of his health, it would vitiate the policy as against the assured, although he was not privy to the representations; for, as Mr. Justice *Bayley* said (a): “The representation made by Mr. *Lyon*, as to the state of his health, must be incorporated in the policy as a condition, making the instrument void or binding according as the condition should or should not be broken. It can make no difference as to the result, in point of law, whether the insurance is for the benefit of the party whose life is insured, or for the benefit of a third person. The truth of the representation is equally a condition in both cases:” and Mr. Justice *Holroyd* said: “It was a conditional policy, and the party for whose benefit it was ef-

(a) 5 Dow. & Ryl. 267.

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fectured must stand to the consequences." As, therefore, the declaration made by *House* to *Lye*, as to the person who was his usual medical attendant, was equivalent to a declaration made by the assured himself; and it was proved that *Vicary* had never attended *House* professionally, the misrepresentation and concealment of the fact that Dr. *Harvey* had frequently attended him at *Bath*, are not only material, but avoid the policy altogether. If *House* had said, that he had called in a quack doctor at *Bath*, *Lye* would, of course, have made further inquiries; and if the office had ascertained that *House* was addicted to drunkenness or intemperance, they would either have refused to effect the insurance, or required a larger premium. Although *Lye* was the agent of the office, yet *House* was the agent of the plaintiff, and was the only person who could give a correct account as to his mode of life, and also the name of the medical man who was in the usual habit of attending him. On the authority of *Maynard v. Rhodes*, the plaintiff cannot be entitled to recover, and, therefore, the Court will direct a nonsuit to be entered.

Lord Chief Justice BEST.—No longer ago than when the case of *Morrison v. Muspratt* came before this Court, we decided, that if reference be made to a person who *had been* the medical adviser, but not to a person who was the medical attendant of the life sought to be insured *at the time the policy was effected*, the omission to refer to the *actual* medical adviser or attendant would vacate the policy, and we granted a new trial, as the circumstance, that the female whose life was insured, was attended by a medical man shortly before the policy was effected, was not disclosed to the assurers, nor submitted to the consideration of the Jury:—and in the subsequent case of *Lindenau v. Desborough*, Lord *Tenterden* spoke in terms of approbation of the decision of this Court; and having, at the trial, left it to the Jury to say, whether there were any facts material to be known, which were

not mentioned to the assurers, and that, if there were, the policy was void:—the plaintiff elected to be nonsuited, leave being reserved to him to move for a new trial, on the ground of mis-direction; and his Lordship said, after argument in *Banc* (a): “Upon the authority of the cases of *Morrison v. Muspratt*, and *Bufe v. Turner* (b), I think I should not have done wrong in leaving the case to the Jury in the manner proposed at the trial:”—and the Court refused a new trial. Now, how is the case of *Morrison v. Muspratt* to be distinguished from the present? It is true, that there, the reference was made by the assured; whilst, here, it was not made by the assured, but by the person whose life was insured. Is then the assured affected or bound by any misrepresentation of the party whose life is insured? That very point was expressly decided by the Court of *King’s Bench*, in the case of *Maynard v. Rhodes*. There, Mr. *Lyon*, on whose life the policy was effected for the benefit of the plaintiff, in conformity with the regulations of the insurance office, attended to give the usual information as to the state of his health. But, a few months afterwards, Mr. *L.* died of a disorder of long standing, but which he had concealed from the office at the time the policy was effected. It is true, that that was a concealment of a more important fact than in the present case; but Lord Chief Justice *Abbott*, who tried the cause, told the Jury, that, if they were satisfied that the representation made by Mr. *Lyon* was not substantially true at the time the policy was effected, it must be considered as a condition incorporated in the policy, by which the plaintiff would be bound, although he himself was not privy to the falsehood of the representation; and his Lordship having directed the Jury to find a verdict for the defendant; after an application for a new trial, on the ground of mis-direction, Mr. Justice

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(a) 8 Barn. & Cress. 592.

(b) 6 Taunt. 338.

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Bayley said: "I am of opinion that the direction of the Lord Chief Justice to the Jury was correct in point of law:" and Mr. Justice *Holroyd* said: "If the Jury were satisfied that the representation, though made by Mr. *Lyon* himself, was untrue, it can make no difference in the legal result, whether the policy was effected for his benefit or not. It was a conditional policy, and the party for whose benefit it was effected must stand to the consequences:"—and Mr. Justice *Littledale* said, that he had not the slightest difficulty upon the point, and that he agreed with the rest of the Court. That is a very recent decision, and is expressly in point. But, if we look at the circumstances of this case, I think we may decide it on the general principle, that if the assurers are bound by the acts of their agent, so the assured must be deemed responsible for any misrepresentations made by his agent, touching the subject-matter of the insurance; and, here, the plaintiff made *House* his agent for that purpose, whose life he agreed to insure; for when Mr. *Lye* applied to the plaintiff, he said that he knew nothing of *House*, that he had never seen him; and he also told *Lye* to make the necessary inquiries respecting him. To whom should *Lye* go to make such inquiries, or who could give him any direct or satisfactory information upon the subject but *House* himself? The plaintiff, as the assured, must, or ought to have known the nature of the statement made by *Lye* to the office, for he swore that he shewed the paper in which such statement was contained, to the plaintiff, and was about to read it to him, when he said, "I dare say it is all correct." If he was acquainted with the terms of *Lye's* statement, he must have known that *House* had been asked the question, "to what medical practitioner do you refer the Directors of the office, as most competent to give evidence respecting your present and general state of health and constitution, and your habits of life?" and that *House* had answered, "I have

never had occasion for a doctor, but Mr. *Vicary*, of *Warminster*, knows as much of me as any man." That was a direct reference to that gentleman, and confined to him alone; and by suffering that statement to be transmitted to the office, the plaintiff adopted the reference, and the answer made by *House*, whom he constituted his agent for the purpose of giving such reference. The question then is, was that a true and proper reference? I clearly think not, on the authority of *Morrison v. Muspratt*; and that the circumstance, that *House* had been attended at *Bath* by Dr. *Harvey*, ought to have been disclosed to the assurers. Mr. *Vicary* stated, that he had never been the medical attendant of *House*, but had only been called in as such by other members of his family. But a quack doctor, although strictly not a medical man, had attended him for several years, during his residence at *Bath*; and although he might have blended the several characters of physician, surgeon, apothecary, and quack doctor together, yet, he might have been enabled to speak of *House's* habits of life, and whether they had a tendency to produce disease. Without entering into the question, whether an inveterate habit of frequently indulging in drunkenness, may have a tendency to produce disease, it is sufficient for us to say, that the *usual* and proper medical attendant on the party whose life was insured, was not referred to, according to the terms and conditions indorsed on the policy, which were set out in the declaration, and in which it was alleged that it was provided that the policy and the assurance thereby effected, should at all times, and under all circumstances, be subject to such conditions and stipulations as were contained in the printed proposals indorsed thereon, in the same manner as if the same were wholly and actually repeated and adapted to the present case; and one of those conditions was, that, "the names and residences of two gentlemen, were to be referred to, respecting the present and general state

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of health of the life to be assured, *one to be the usual medical attendant of the party.*" The plaintiff afterwards averred, that he had in all things conformed himself to, observed, performed, and kept all things in the policy, and the conditions and stipulations therein contained, on his part to be observed and performed, and consequently that must include the condition as to the usual medical attendant of the party whose life was proposed to be insured. Without proof of such reference having been made, the plaintiff could not be entitled to recover; and it is not an unnecessary allegation, for the declaration would have been bad without it, as it would not have truly set forth the contract between the parties. That contract was not confined to what is contained in the body of the policy, but extended to the conditions indorsed upon it, and also embraces the stipulations or representations required by those conditions; and it was incumbent on the plaintiff to allege and prove that the whole of them had been complied with. That, however, he failed to do; and I think that *House* must be considered as his agent, and that the plaintiff was bound by his misrepresentations, and consequently that this action cannot be sustained.

Mr. Justice PARK.—In all cases where assurances are effected on lives, every regard and attention should be paid to the assured, as, in general, the assurance is effected, either to make provision for his family, or for a debt *bonâ fide* due to the person for whose benefit the insurance is made. Here, there is no ground to cast the least imputation on the plaintiff, for I have no doubt, that the transaction, as far as he was concerned, was conducted *uberrimâ fide*. Wishing, however, to give every indulgence and latitude to the assured, still there must be a full and accurate representation made by him to the assurer, of all the material circumstances relative to the profession and state of health of the party whose life is

meant to be insured, if not, the parties would enter into the contract on unequal terms. Applying that principle to the present case, I am of opinion, that the plaintiff is not entitled to recover. What are the facts? Mr. *House's* life being the subject of insurance, the plaintiff being the person who was to be benefited by such insurance, informed the agent of the Company, that he did not know *House*, and desired him to make the necessary inquiries respecting him. The agent, of course, thought that he could obtain the best information from *House* himself, and went to him accordingly. The plaintiff, therefore, must be bound by the representations made by *House*, concerning his state of health, and the medical person who usually attended him. He was asked by *Lye*, who was his usual medical attendant, when he answered, that he had never had occasion for a doctor, that sometimes he had taken *Harvey's* quack pills, but that Mr. *Vicary*, of *Warminster*, knew as much of him as any man. But, that was not true; for, so far from Mr. *Vicary* being his usual medical attendant, that gentleman stated at the trial, that he had never attended *House* professionally, but only some of the members of his family, at *Warminster*. Although Dr. *Harvey* might unite all the different branches of the profession in his practice as a quack doctor, still he was the usual medical attendant of *House*, and his name was never mentioned by him. Is, then, the plaintiff, who causes the insurance on the life of *House* to be effected, to be bound by his acts. The case of *Maynard v. Rhodes* appears to me to be expressly in point, and undistinguishable from the present. There the assured was as ignorant of any thing like fraud, and as free from suspicion as the plaintiff in this case, and yet the Court held that he was bound by the representations of the life insured. But, it has been said, that the representation made by *House*, as to the person who was his medical adviser, was not so material a mis-statement as in the case of *Maynard*

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v. *Rhodes*; but I think it was. If *House* had never called in or employed a medical man, the question would be altogether different; but having done so, it was most material that he should have been referred to, and the plaintiff must, or ought to have known that it was material, for he has averred in his declaration, that he has in all things conformed himself to, performed, fulfilled, and kept all things in the policy, and conditions, and stipulations therein contained, to be observed and performed on his part; and, therefore, he could not be entitled to recover in this action without proving an exact and strict performance of all those conditions and stipulations. He might have alleged that the defendant had dispensed with the condition as to a reference to the usual medical attendant of the party whose life was to be insured, according to the principle established in *Jones v. Barkley (a)*, where it was held, that if it be agreed, that some act should be performed by each of two parties at the same time, he who was ready and offered to perform his part, but was discharged by the other, might maintain an action against the other for not performing his part of the agreement. Here, however, the plaintiff has averred the exact performance of all the conditions and stipulations indorsed on the policy, and failed to prove that *House* referred to his usual medical attendant, which was one of the conditions. If this objection had been raised at the trial, it would have been an answer to the action. I cannot but regret that the plaintiff has lost the benefit of his insurance, but it is of the utmost consequence to the public, that our decisions should be founded on legal principles, and that we ought not, on any account, to infringe on established rules, or overturn cases which are founded on a legal basis.

Mr. Justice BURROUGH.—It is now difficult to frame a declaration on a policy on a life insurance, on which the

(a) 2 Doug. 684.

assured can succeed, as the Directors of several Companies seek to avail themselves of every possible objection. But I am of opinion that we are bound to decide this case on the authority of *Maynard v. Rhodes*, for the party whose life was insured concealed a most material fact from the agent of the office, whom the plaintiff directed to make the necessary inquiry, *viz.* the name of his *usual* medical attendant; and *House* not only did this, but said, that he had never had occasion for a doctor, which was completely negatived at the trial, as it appeared that he had always been attended by Dr. *Harvey* after his fits of drunkenness had subsided. He might have died of a disease occasioned by frequent intoxication, which, in all human probability, would tend to shorten his life; and the misrepresentation made by him vacated the policy, as he referred to a medical man who, in fact, had never attended on him as such. One of the particulars required to be stated by the conditions, previously to the policy being effected, was the names and residences of two gentlemen who might be referred to, respecting the present and general state of health of the life to be assured—one to be the usual medical attendant of the party. In this case, Dr. *Harvey* was the person to whom *House* ought to have referred, and who, if applied to, would, no doubt, have disclosed the facts of his intemperance and habitual acts of drunkenness: and at the bottom of the conditions indorsed on the policy, it is stated, that a declaration as to *all* the above points will be considered as the basis of the contract between the assured and the Company: and, if the declaration be not true in every respect, the policy will be void. As, therefore, the reference required to the usual medical attendant of the party whose life was to be insured, was not complied with, but was altogether suppressed, and a misrepresentation made to another, I concur with the Court in thinking that the plaintiff is not entitled to recover.

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Mr. Justice GASELEE.—I am of the same opinion. I have looked most attentively at the case of *Maynard v. Rhodes*; it is there stated that the person whose life was insured, attended himself to give the usual information as to the state of his health, in conformity with the regulations of the office (a). Now, it appears by the conditions, that that is not necessary, as he might attend before one of the Company's agents; and here, *Lye*, as such agent, went to *House* for the purpose of making the necessary inquiries, which the plaintiff requested him to do. By one of the conditions indorsed on the policy, it is necessary that the names and residences of two gentlemen should be referred to, respecting the state of health of the life to be assured, one of whom was to be his usual medical attendant. Now, who is the person who can best disclose the name of such attendant? Unquestionably, the party whose life is meant to be insured; and here, *House* was applied to by the authorized agent of the Company for that purpose, and with the sanction of the plaintiff himself; and *House* certainly gave a gross misrepresentation of the fact. But it has been said, that *House* was not the agent of the plaintiff; yet, *Lye* was the agent both for him and the Company; for the plaintiff told *Lye* to make the requisite inquiries respecting *House*, and when *Lye* was about to read the statement he had made in writing to the plaintiff, he stopped him and said: "I dare say it is all correct." That appears to me to constitute *Lye* the agent of the plaintiff, as far as he was authorized to make the necessary inquiries, and he must be therefore bound by the misrepresentations made to him by *House*, to whom it must be assumed that the plaintiff referred, as he was the only person likely to give correct information on the subject. No objection was raised at the trial, as to a variance between the conditions as set out in the declaration, and the proof as to the pro-

(a) See 5 Dow. & Ry. 266.

per reference to the usual medical attendant of *House*. I admit, that it was competent to the assured to have dispensed with either of the conditions indorsed on the policy, according to the principle established in *Jones v. Barkley*. There, however, the case of *Kingston v. Preston* was referred to (a), where Lord *Mansfield* drew a distinction between mutual and independent, and dependent covenants, and conditions precedent or subsequent; and here, the plaintiff ought to have averred, not only that he had complied with certain stipulations required by the conditions, but that he was absolved from the exact performance of the whole, as the office did not insist upon it. Then, the question would have been, whether the office had dispensed with the condition requiring the reference to *House's* usual medical attendant, or not, and which might have been proved at the trial. I was then strongly inclined in favour of the plaintiff, but now agree with the Court, in thinking, that the rule for the nonsuit must be made—

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Absolute.

(a) 2 Doug. 688.

ARMITAGE v. NANCY BERRY, Administratrix of JOSHUA BERRY, deceased.

Saturday,
 May 30th.

THIS was an action of *assumpsit*, and brought against the defendant, as administratrix of her late husband, a surety for the payment of the sum secured by the following promissory note:—

“ *Deighton*, near *Huddersfield*, March 9th, 1816.

“ On demand, we jointly and severally promise to pay Mr. *Joseph Gummersall*, or order, the sum of 100*l.* of law-

An instrument in these words: “ On demand, we jointly and severally promise to pay J. G., or order, 100*l.* with lawful interest for the same, from the date hereof,” requires only a promissory note stamp of 3*s.* 6*d.*, as it is distinguishable from a note payable to bearer on demand, which may be re-issued after payment.

able from a note payable to bearer on demand, which may be re-issued

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ful money of *Great Britain*, with lawful interest for the same, from the date hereof, value received.

As witness our hands.

Wm. Jackson.

Joshua Berry.

Wm. Dyson."

Indorsed—" *Joseph Gummersall.*
John Armitage."

By an order made by Lord Chief Justice *Best* on the 13th *April* last, all matters in this cause were referred to an arbitrator, who, on the 23rd instant, found that there was due to the plaintiff, upon the above note, 46*l.* 6*s.* 1*d.*, which sum he awarded to be paid by the defendant, as administratrix, to the plaintiff, together with the costs of the action and of the reference. The arbitrator then stated, at the request of the defendant, that when the note was given in evidence before him, it was impressed with a 3*s.* 6*d.* stamp, when it was objected, on the part of the defendant, that it ought to have been impressed with an 8*s.* 6*d.* stamp, as coming within the first class of promissory notes mentioned in the statute 55 *Geo.* 3, c. 184, Schedule Part 1 (a); and the case of *Keates v. Whieldon* (b), was cited and relied on as an authority in favour of the point. That, after attentively reading that case, the arbitrator over-ruled the objection, being convinced that it did not apply in this instance, because, the note in question being payable *to order*, and transferable only by indorsement, could not be re-issued after having been once paid; and it being the

(a) 8 *Barn. & Cress.* 7; *S. C. nomine East v. —*, 2 *Man & Ryl.* 8.

(b) By which, a promissory note, for the payment, *to the bearer on demand*, of any sum of money exceeding 50*l.* and not exceeding 100*l.*, is liable to a stamp of 8*s.* 6*d.*, which note may be re-issued, after payment thereof, as often as shall be

thought fit.—A promissory note, for the payment, *in any other manner than to the bearer on demand*, but not exceeding two months after date, or sixty days after sight, of any sum of money, exceeding 50*l.* and not exceeding 100*l.*, is liable to a stamp of 3*s.* 6*d.* and is not to be re-issued after being once paid.

uniform practice of the profession and of merchants to use, and of the stamp distributors to give out stamps of the second class for promissory notes of this description, the arbitrator did not feel the slightest doubt in considering the note to be properly stamped. But he stated the above circumstances, in order that he might have the opinion of the Court upon the subject.

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The order of reference having been made a rule of Court, Mr. Serjeant *Jones* now applied for a rule to shew cause why this award should not be set aside, and he renewed the objection taken before the arbitrator, and, in support of it, relied on the 14th section of the 55 *Geo.* 3, and contended, that the case fell within the principle of *Theates v. Whieldon*, where the defendant gave a note to the plaintiff, by which he promised to pay the plaintiff 11*l.* 10*s.* on demand, and it was held to be a promissory note payable to *bearer* on demand, and that it required a stamp as such (a). The learned Serjeant admitted, that, although there was a distinction between the words *to bearer* or *to order*, yet, as the note was payable on demand, and not within any limited period, it fell within the first class of notes mentioned in the statute.

But the Court were clearly of opinion that there was no colour for the objection; and that all notes that were not payable to *bearer on demand* fell within the second class, as well upon principle, as on the grammatical wording of the statute; for, being payable to order on demand, it was distinguishable from a note payable to *bearer*; and they considered the case of *Keates v. Whieldon* to be rather a strained construction of the act.

The learned Serjeant, therefore, took nothing by his motion.

(a) But, in the report of that case in *Manning & Ryland*, it appears that the note was payable to the bearer.

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The plaintiff distrained the defendant's cattle, *damage feasant*, and went to apprise him of the circumstance, leaving the cattle in a close of the defendant, where they remained half an hour. On the plaintiff's return he drove the cattle from the defendant's close, to his own yard, whence they were liberated by the defendant:—*Held*, that this was not a rescue; as the leaving the cattle in the defendant's close was an abandonment of the distress.

KNOWLES *v.* BLAKE and SAYERS.

THIS was an action on the case, and brought to recover a compensation for an injury alleged to have been committed by the defendant *Blake*, and *Sayers* his servant, in liberating three horses belonging to *Blake*, which the plaintiff in his declaration stated that he took and distrained in his close, doing damage there, and that he impounded them according to the law and custom of *England*.

At the trial, before Mr. Baron *Garrow*, at the last Assizes for the county of *Sussex*, it appeared that the plaintiff occupied a close adjoining a field belonging to the defendant *Blake*. That, in *August*, 1827, a person saw three horses of *Blake's* in the plaintiff's field, and went to inform him of it. That, in the mean time, the horses were discovered there by the defendant *Sayers*, who drove them towards a gateway in the plaintiff's field, which communicated with a lane, on the opposite side of which was another close of *Blake's*, called the *Nursery*. That as soon as the plaintiff came into his field, the horses ran across the lane into the *Nursery*; and when they got through the gateway, the plaintiff said that *Sayers* should not take them, as they had been in his field before, and that he could bear it no longer. That the plaintiff then went to *Blake's* house, for the purpose of obtaining compensation for the injury done by the horses to his tares, with which the field in question was cropped, and was absent half an hour, during the whole of which period the horses continued in the *Nursery*. *Blake* having refused to make any remuneration to the plaintiff, he and his son went to the *Nursery* and drove out the horses, and took them to his farm-yard, where they remained five hours, at the expiration of which time they were liberated by the defendant *Sayers*, and driven back to *Blake's* field, from whence they had originally strayed.

The defendant *Sayers* suffered judgment by default: and it was objected for *Blake*, that there was no rescue in point of law; because, even admitting the distress to be sufficient in the first instance, the plaintiff had abandoned it by allowing the horses to escape from his field and go into *Blake's* close called the *Nursery*, and that he had no right to remove them thence on his return from *Blake's*. The Jury however found a verdict for the plaintiff, damages 5*l.*, leave being reserved to *Blake* to move to set it aside, and enter a nonsuit, or that a verdict might be entered for him, in case the Court should be of opinion, that the objection taken at the trial was well founded.

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Mr. Serjeant *Cross*, on a former day in this Term, accordingly obtained a rule *nisi*, and submitted, that, although the horses were found trespassing in the plaintiff's field, they were not lawfully distrained in the first instance, as the plaintiff did not then declare that he intended to distrain them, but only said, that *Sayers* should not take them; but even, if there had been a sufficient distress, it was abandoned, by allowing the horses to remain in *Blake's Nursery* for the period of half an hour. The plaintiff was not justified in removing them thence on his return from *Blake's*; he was, therefore, guilty of a trespass in driving them out of the *Nursery*; and, as they were improperly taken to the plaintiff's yard, the defendant *Sayers* was justified in liberating them, and consequently had not been guilty of a rescue. A distress is defined to be the taking of a personal chattel, without legal process, from the possession of a wrong-doer, into the hands of the party grieved, as a pledge for the redress of the injury done; and here, there was no evidence of such an act, as, when the defendant *Sayers* was driving the horses out of the plaintiff's field, he merely said, that he could not let them

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go away; but he said nothing as to a distress, nor did he take any means to secure them. It must therefore be inferred, that the plaintiff had not determined whether he should distrain the horses or not, until his return from *Blake's* house. Lord *Coke* says (a): "If the lord, coming to distrain, had no view of the cattle within his fee, though the tenant drive them off purposely, or if the cattle of themselves, after the view, go out of the fee, or if the tenant after the view remove them for any other cause than to prevent the lord of his distress, then cannot the lord distrain them out of his fee; and if he doth, the tenant may make rescous. If a man come to distrain for *damage feasant*, and see the beasts in his soil, and the owner chase them out of purpose, before the distress is taken, the owner of the soil cannot distrain them; and if he doth, the owner of the cattle may rescue them; for the beasts must be *damage feasant* at the time of the distress; and so note a diversity."

Mr. Serjeant *Andrews*, afterwards shewed cause.—The plaintiff clearly intended to distrain the horses, when he saw them in his field, as he told *Sayers* he would not let them go. No formal words are necessary to constitute a legal distress; and the horses got into *Blake's Nursery*, in their transit from the plaintiff's field to his yard, where they were ultimately taken; and although they were allowed to remain in the *Nursery* for half an hour, it cannot be considered as an abandonment of the distress. In *Clement v. Milner* (b), Lord *Eldon* held it to be sufficient to justify the taking of cattle *damage feasant*, that the distrainer should have entered the *locus in quo*, whilst the cattle were in it. No precise act is necessary to constitute a distress, for in *Wood v. Nunn* (c), where the landlord said,

(a) Co. Lit. 161 (a). (b) 3 Esp. Rep. 95. (c) 2 Moore & Payne, 27.

that he would not suffer certain articles to be removed by the tenant, until his rent was paid; and afterwards sent his broker to distrain: it was held, that the landlord had a right to seize and bring back property which the tenant had removed from the premises in the interval. Therefore, a mere intent to distrain is sufficient. Lord *Coke* says (a)—“If the lord come to distrain cattle which he seeth then within his fee, and the tenant or any other, to prevent the lord to distrain, drive the cattle out of the fee of the lord, into some place out of his fee, yet may the lord freshly follow, and distrain the cattle; and the tenant cannot make rescous, albeit the place wherein the distress is taken is out of his fee; for now, in judgment of law, the distress is taken within his fee, and so shall the writ of rescous suppose.” So, if a distrainor detain cattle distrained, and go to inform the owner of the distress, and they escape into the lands of the owner during his absence, yet may he freshly follow, and distrain them on his return.

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Mr. Serjeant *Cross*, in support of his rule.—The plaintiff did not attempt to distrain the horses whilst they were in his field, nor does it appear that he then contemplated a distress. Lord *Coke* draws a distinction between a distress for rent and a distress *damage feasant*, and says, that the distress must be *damage feasant* at the time of the distress; and here, as the horses had escaped from the plaintiff's field and got into *Blake's Nursery*, the plaintiff had no right to follow them there, particularly after he had allowed them to remain there for half an hour, by which the previous distress, if lawful, was abandoned and completely at an end; and as the plaintiff was a trespasser in entering the defendant's *Nursery* and removing the horses to

(a) 161 (a).

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his yard, the defendant *Sayers* had a right to follow and liberate them from the place where they had been unlawfully taken.

The Court recommended a *stet processus*, which not being acceded to, they took time to consider.

Lord Chief Justice BEST, now delivered judgment as follows:—

We felt little, if any, difficulty, after the conclusion of the argument, but hoped that the parties might be induced to come to an amicable arrangement, without requiring us to pronounce judgment, particularly as one of the defendants had suffered judgment by default; and, as damages must be assessed as against him, it is not very material whether the defendant *Blake* have a verdict entered for him or not. Two points have been raised and relied on for him—*First*, that there was no sufficient distress in the first instance, when the horses were in the plaintiff's field; but we are all clearly of opinion, that the horses were well distrained; on the ground, that no precise act or form of words is necessary to constitute a legal distress. The distrainer is not bound to lay his hand on the cattle; it is sufficient if he endeavour to prevent their escape from the field in which they are trespassing. But, a distress for *damage feasant*, is a matter of strict right, and if the party distraining permit the cattle to escape, or go out of his lands, his right to distrain is gone, and he has his remedy by action against the owner of the cattle for the injury done to his property. But a mere escape for a moment, if the distrainer immediately follows, would not be an abandonment of the distress; for Lord *Coke* says (a)—“A rescous in law is, where a man hath taken a distress, and the cattle distrained, as he is driving of them to the pound,

(a) Co. Lit. 161 a.

go into the house of the owner, if he that took the distress demand them of the owner, and he deliver them not, this is a rescous in law." So, here, if the plaintiffs had followed the horses from his field into the defendant's *Nursery*, and instantly driven them back, or taken them directly to his yard, we are all of opinion that this action might have been maintained; but as he allowed them to remain in the *Nursery* for half an hour, and they were not demanded during that time, it was an abandonment of the right of freshly following them, and consequently an end of the distress. Lord *Coke* says: "If the cattle, of themselves, after the view, go out of the fee, then cannot the lord distrain them:" and in *Vasper v. Eddows*, Lord Chief Justice *Holt* said (a), "if a distress for *damage feasant* dies in pound, or escapes, the party shall not distrain *de novo*; but if it were for rent, in either case he may distrain *de novo*." That is a far stronger case than this, as the horses had never been in the pound. We are, therefore, of opinion, that a verdict must be entered for the defendant *Blake*, and that damages must be assessed by a Jury against the defendant *Sayers*, who has suffered judgment by default.

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Rule absolute accordingly.

(a) Holt's Rep. 257; S. C. nomine *Vaspor v. Edwards*, 12 Mod. 658.

1829.

Monday,
June 1st.

ELLIS v. SCHMÆCK and THOMAS.

In an action of *assumpsit* for goods furnished to a Mining Company, it appeared that the defendants had paid their deposits on shares, and obtained scrip receipts, which they transferred previously to the commencement of the action, they attended two meetings of of the Company, but did not sign the partnership deed. The Jury found, that the Company originated in fraud, but that neither the plaintiff nor defendants were cognizant of it:—*Held*, that the defendants were liable, by having attended the meetings of the Company.

THIS was an action of *assumpsit* for goods sold and delivered. At the trial, before Mr. Justice *Gaselee*, at *Guildhall*, at the Sittings after *Trinity* Term, 1827, it appeared that the plaintiff, an upholsterer, had supplied certain articles, to the amount of 234*l.*, for furnishing a counting-house and offices in *Lombard-street*, for the *Cornwall* and *Devonshire* Mining Company. That the defendant *Schmæck*, was one of the original shareholders, but that *Thomas* did not purchase his scrip until after several of the articles in question had been supplied. That both the defendants received certificates from the Secretary of the Company, of their having paid a deposit upon the purchase of their shares, and had accepted scrip receipts accordingly. That they had not signed the Company's deed of copartnership, but had transferred their shares previously to the commencement of this action; that they were both present at two general meetings of the Company, in *August*, 1825, and *July*, 1826, but that nothing transpired at those meetings as to the plaintiff's demand on the Company, nor did the defendants know that the goods had been furnished by him. Under these circumstances, it was objected for the defendants, that, as they had transferred their shares, and not signed the deed of copartnership, they could not be liable to the plaintiff, as they had ceased to be shareholders previously to the commencement of the action; and the case of *Lawler v. Kershaw* was cited, where Lord *Tenterden* said (a): "A question has been raised, whether the mere payment of an instalment by the defendant, is sufficient to constitute him a partner; but I think I am

(a) 1 Mood. & Malk. 95.

not called on in this case to decide that point. There is another fact, that, after the payment, the defendant executed the deed." The learned Judge intimated no opinion as to whether the defendants were partners or not; but the Jury found that the Company originated in fraud, but that neither the plaintiff nor the defendants were privy or parties to the fraud; and they found a verdict for the plaintiff for the whole of his demand.

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Mr. Serjeant *Wilde*, in *Michaelmas* Term, 1827, obtained a rule *nisi*, that this verdict might be set aside, and a nonsuit entered instead thereof, or that the damages might be reduced to 187*l.* 17*s.* 1*d.*, being the amount of the articles furnished subsequently to the purchase of the scrip by the defendant *Thomas*; and he submitted, that as no personal credit was given to either of the defendants by the plaintiff, and he in fact did not know that they were shareholders or members of the Company, at the time the goods were supplied, he could not be entitled to recover; and although the defendants paid the deposits required on the purchase of the original shares or transfer of the scrip receipts, yet, as they had transferred their scrip, they could no longer be considered as members of the Company, or liable for any demands that might be made upon them. The defendants never pledged themselves to become personally responsible to the plaintiff, who supplied the goods on the credit of others, and no contract can, therefore, be implied as between the plaintiff and defendants; and, as the Jury found that the Company originated in fraud, the deposits made by the defendants were wrongfully obtained, and their finding is consequently conclusive to shew that the plaintiff cannot be entitled to retain his verdict.

Mr. Serjeant *Taddy* and Mr. Serjeant *Spankie*, afterwards shewed cause.—The facts in this case raise a novel

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v.
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and important question, which must be decided on the principles by which partnerships are formed and constituted; and it is immaterial whether the concern be of a limited nature, or the firm confined to a few individuals; or whether the business carried on is of the most extensive nature, or the Company is composed of an unlimited number of members. As the defendants became shareholders, and purchased the Company's scrip, and attended two of the general meetings, they became partners in the concern, at least they acted as such, as far as regarded the rights and claims of third persons who had supplied the Company with goods, although the defendants had not in fact signed the deed by which the Company was to be incorporated, and under the terms and regulations of which the business was to be carried on. Although the formation of the Company might have been conceived and founded on deception and fraud, as between the original proposers, yet the Jury have expressly negatived all fraud between the plaintiff and defendants; and it is quite clear that the signing the deed was not essential to constitute the latter partners. In the case of a limited partnership, if one partner has only one hundredth share, yet he is liable for the debts of all the partners, and to the full extent of any advances that may be made by third persons to the concern; and however small the profits between themselves may be, they are liable to those who make such advances, as they are induced to give them credit, on the presumption that they are partners; and here, both the defendants had acted as such; and as they procured the certificates and scrip receipts, and paid the deposits on their respective shares, they were subject to the laws and regulations of the Company, which were contained in the deed, although they had not in fact executed it. If a ship's husband order necessities for her supply, and a person afterwards applies for a share in the vessel, and receives a document by which he be-

comes a part owner, and he afterwards attends a meeting of the other owners and others interested in the ship, there can be no doubt but that the husband may sue him for the articles supplied, although it should turn out that the parties from whom he purchased his share had no title to the ship or right to convey the share to the purchaser. In *Lawler v. Kershaw*, Lord *Tenterden* gave no opinion as to the question, whether the defendants, who were shareholders in the same Company as the present defendants, were partners by the mere payment of the deposits or instalments on their shares, as they afterwards actually signed the partnership deed. In *Vice v. Lady Anson* (a), the defendant merely stated in private letters and conversation that she was a shareholder, but she had attended no meetings of the Company, nor could it be presumed that she was a member, as she had done no act to become a participator in the concern, but by the payment for shares, and receiving a certificate that she was a proprietor of them. The case of *Perring v. Hone* (b) is expressly in point, and an authority in favour of the plaintiff. There, Sir *John Perring's* name was entered in a book with those of several other subscribers to a projected Joint Stock Company, and he received certain scrip receipts; and although he sold them before the deed for the formation of the Company was executed, and never was a party to the deed, it was, nevertheless, held, that he was a partner in the concern; and Lord Chief Justice *Best* said: "All who subscribed to the partnership fund must be taken to have assented to the deed." In *Neale v. Sir Thomas Turton* (c), the plaintiff, a holder of shares in a Company, drew bills on the directors for goods supplied by him to the Company; and the bills were accepted "for the directors" by the secretary of the Company; and yet it was held that

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(a) 1 Mood. & Malk. 97; S. C.
7 Barn. & Cress. 409; 3 Carr. &
Payne, 19; 1 Man. & Ryl. 113.

(b) 4 Bing. 28.
(c) 4 Bing. 149.

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the plaintiff could not recover on these bills against the Company, on the ground that the plaintiff was a member of the Company, and, therefore, that he might be assimilated to a partner drawing on the whole firm, including himself; and that the bills being drawn on the directors were in effect drawn on the Company, of which the plaintiff was himself a member. In the case of *The King v. Dodd*, where it was proposed to raise money by subscription for trading purposes, and make the shares in the joint stock transferable, Lord *Ellenborough* said (a): "As to the subscribers themselves, indeed, they may stipulate with each other for this contracted responsibility; but as to the rest of the world, it is clear that each partner is liable to the whole amount of the debts contracted by the partnership." So, here, as the plaintiff gave credit to the Company, of which the defendants were members, and they acted as partners by attending the meetings, they rendered themselves liable as such; and it was not incumbent on him to inquire into the precise nature of the establishment, or its internal regulations, or the particular arrangements made between the members of the Company. If the defendants expected to participate in the profits to be derived from the carrying on of the concern, it would be sufficient to constitute them partners. *Crawshay v. Collins* (b). So, the merely deriving a casual advantage from the profits of trade, makes a man a partner. *Bloxham v. Pell* (c). In *Ex parte Langdale*, Lord *Eldon* said (d): "A man, who is to have no profit, may be a partner, if holding himself out as such, as by lending his name. The true criterion is, whether he is to participate in profit. That has been the question ever since the case of *Grace v. Smith* (e)." The same principle was establish-

(a) 9 East, 527.

(b) 15 Ves. 218.

(c) 2 Sir Wm. Bl. 999, n.

(d) 18 Ves. 301.

(e) 2 Sir Wm. Bl. 998.

ed in *Ex parte Hamper* (a). So, in *Ex parte Hodgkinson* (b), it was held, that a man might become a partner by a share in the profits, without having an interest in the capital; and, in *Ex parte Watson*, Lord Eldon said (c): "If a partner retiring, or coming into the trade, suffers his name to be used; it is of no consequence whether he has a salary, or sum of money, to be paid by others, or to be got out of the profits. It is the use of the name that makes him liable as one of the persons by and to whom every thing is bought and sold;" and here, there can be no doubt but that the defendants purchased the shares, with a view to the profits to be derived from working the mines, for which purpose the Company was formed and established.

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Mr. Serjeant *Wilde* and Mr. Serjeant *Merewether* in support of the rule.—The principles applicable to the case of a private partnership are wholly beside the present question, which must be confined to the single point, whether, under the particular circumstances of this case, the defendants are chargeable as partners. A written contract between them and the Directors or members of the Company was essential to create a joint liability in the defendants, and on that alone could the plaintiff, as the creditor of the Company, be entitled to charge them. The Company having originated in fraud between the projectors, but to which the defendants were no parties, they cannot be considered as partners in the concern; and if persons conspire together to obtain money from an innocent party, no contract can arise or be created from the mere payment of such money, so as to make the party paying liable to all demands which may be made by third persons on the original contractors. Although the Company assumed the name of the *Cornwall* and *Devonshire* Mining Company, they never intended to work mines, but

(a) 17 Ves. 403.

(b) 19 Ves. 291.

(c) Id. 461.

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merely to obtain money from the public, and mis-appropriate it to their own purposes, or apply it to their own use, without meaning that the parties who might buy shares, should derive any advantage from such purchases; a part of the fraud was the taking and furnishing the offices in question, where it appeared that a most extensive business was about to be carried on. The defendants had no interest in the concern after they had disposed of their shares, and transferred their scrip; and the plaintiff must look to the persons who gave him the order for the furniture, and not seek to recover from those who had no share in the transaction. Although it has been said, that a person who purchases the share of a ship is liable with the other part-owners for articles supplied for her use, although the title turn out to be defective; yet, the contrary doctrine was established in *Harrington v. Fry* (a), where the Court held, that, under such circumstances, the purchaser was not liable, unless credit were given to him individually, or he had held himself out as owner, or had made an express promise to pay, or received profits from the ship—and Lord Chief Justice *Best* said: “The principle to be deduced from all the previous authorities is, that a person can only be charged in respect of stores or goods furnished to a ship, either on the ground that credit has been given to him personally, or as owner, or that he has held himself out to the world as owner, and that must be taken to mean the legal owner.” Here, the plaintiff never gave the defendants credit personally, nor did they hold themselves out as shareholders or partners in the concern, and there was no community of interest as between them and those who gave the order for the furniture. In *Nockels v. Crosby* (b), where a scheme for establishing a ton-tine was put forth, stating that the money subscribed was to be laid out at interest; and, after some subscriptions had been paid to the Directors, in whom the management of the concern was vested, but before any part of the

(a) 9 B. Moore, 344; S. C. 2 Bing. 179.

(b) 3 Barn. & Cress. 814; S. C. 5 Dow. & Ryl. 751.

money was laid out at interest, the Directors resolved to abandon the project:—it was held, that each subscriber might, in an action for money had and received, recover the whole of the money advanced by him, without the deduction of any part towards the payment of the expenses incurred. So, here, the mines were never intended to be worked, and eventually the scheme was abandoned altogether. What was done, therefore, was merely preliminary to a partnership; and the purchasers were induced to take the scrip receipts, and become shareholders, by false pretences, originating with the projectors of the Company, who alone were benefited by the transaction. In *Vice v. Lady Anson*, the defendant acknowledged that she was a shareholder after she had paid her deposits on her shares and received the certificates. Here, however, the defendants never represented themselves as shareholders, and, although they attended two meetings, it did not appear that they took any part in the proceedings, or that they adopted any acts of the parties who assembled at those meetings. In *Perring v. Hone*, the transaction on which the projected Company was to be formed, was *bond fide*, whilst here, the Jury found that it originated in fraud; and *ex dolo non oritur jus*; and as the sums paid by the defendants for the scrip receipts were fraudulently obtained, they were entitled to recover them back in an action for money had and received, according to the case of *Nockels v. Crosby*, which was decided on the ground of the failure of consideration upon which the sums were advanced.

The Court said, that as the facts of this case raised a question of considerable importance to the public, and there were several cases depending in the Court of King's Bench, as well as the case of *Meagher v. Hammond*, which had been, in the course of last Term, argued before all the Judges, on a special verdict, they would not form a premature judgment, or come to a hasty conclusion. They therefore took time to consider; and none of those cases having been decided—

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Mr. Justice PARK, now delivered the judgment of the Court, as follows:—

We have looked into this case, which was argued before my Brothers *Burrough* and *Gaselee*, and myself, in the absence of the Lord Chief Justice, and we are satisfied that the plaintiff is entitled to judgment. We had thought that one of the cases which is now pending in the Court of *King's Bench*, might have thrown some light upon the subject, but we are of opinion, that there is no case which immediately touches this. The action was for goods sold and delivered, and we think the Jury have, by their verdict, gone very far to conclude the question, because they have found that the defendants formed part of a Company, which indeed was founded in fraud, but they have acquitted both the defendants and the plaintiff of any cognizance of that fraud. It appeared that the articles supplied, consisted of upholstery to a considerable amount, for furnishing the offices in which the business of the Company was to be carried on. Under all the circumstances of this case, it seems to us to approach very nearly to that of *Perring v. Hone*, in which we were all convinced that the plaintiff was not entitled to recover, as he might be deemed a partner in the concern. There, Sir *John Perring* had entered his name in a book, together with several other persons, as subscribers to a projected Joint Stock Company; he accepted scrip receipts, but sold them before the deed for the formation of the Company was executed; and he never signed that deed; but, as he had attended meetings of the Company, and was engaged in the concern, we, upon consideration, were of opinion, that he was still liable. The case of *Vice v. Lady Anson* does not appear to us to touch the present, because, although she had received the scrip receipts, and had in her conversations with some of the members of her own family talked of being a subscriber to the Company, yet it did not appear that she had ever held herself out to the world as a partner, in any respect whatever. Here, however, the defendants at-

tended two of the general meetings; and although they had not signed the deed, that was no more than was urged in the case of *Perring v. Hone*. It appears that goods were furnished by the plaintiff to the Company, to the amount of 234*l.*; but we think, that, with regard to *Thomas*, the verdict ought to be confined to the value of those supplied after he became concerned with the Company, and which amounted to 187*l.* 17*s.* 1*d.* The plaintiff therefore is entitled to retain his verdict, and judgment must be entered for him against *Thomas* for that sum.

Rule discharged accordingly.

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IN THE EXCHEQUER CHAMBER.

LLOYD and Others v. SIGOURNEY.

[In Error.]

Wednesday,
May 13th.

THIS was a writ of error from the Court of *King's Bench*, in an action of *assumpsit* for money had and received. The defendants below (plaintiffs in error) pleaded the general issue.

At the trial, before Lord *Tenterden*, the Jury found a verdict for the plaintiff below (defendant in error), subject to the opinion of the Court of *King's Bench*, upon a special case, which, after judgment for the plaintiff below, was turned into the following special verdict.

In the month of *July*, 1825, *Amaziah Attwood*, who commanded a vessel belonging to the plaintiff below, took, in payment of a cargo of flour, the property of the plaintiff below, which he sold at *Rio Janeiro*, a bill of exchange for 3,164*l.* 11*s.* 8*d.*, drawn in a set of three, by *March, Sealey, Walker, & Co.* of that place, on *March, Sealey, & Co.* of *London*. This bill was payable to the order of

A bill of exchange drawn abroad, on a house in *London*, payable to order, was indorsed generally by the payee to *A.*, who indorsed it as follows:—"Pay to *B.*, or his order, for my use." *B.* applied to his bankers to discount the bill, which they did, and applied the proceeds to the use of *B.*, without making any inquiry or looking at the indorsement:—*Held*, that the indorsement was restrictive; that *B.* was a

trustee for *A.*; that the property in the bill remained in the latter; and that he was entitled to recover the amount from the bankers, in an action for money had and received.

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Messrs. *Hendricks, Weirss, & Co.*, who indorsed it to *Attwood*.

The following is a copy of the third part of the bill:—

“ *Rio de Janeiro*, 12th *July*, 1825.

“ For 3,164*l.* 11*s.* 8*d.*

“ At sixty days’ sight, pay this third of exchange, first and second not paid, to the order of Messrs. *Hendricks, Weirss, & Co.*, three thousand one hundred and sixty-four pounds, eleven shillings, and eight pence, value of the same, which place to account as *per* advice from

March, Sealey, Walker, & Co.

To Messrs. *March, Sealey, & Co.*, *London*.”

This bill was indorsed by the payees to *Attwood*, or order, by *Attwood* to the plaintiff below, and by the latter in the following words—

“ Pay to *Samuel Williams*, Esq., of *London*, or his order, for my use.”

Williams indorsed it to the defendants below.

Attwood sent the first of the set to the correspondent of the plaintiff below, Mr. *Samuel Williams*, of *London*, who was an *American* agent and factor for merchants and planters, carrying on such business to a very great extent, inclosed in the following letter:—

“ Sir,—I herewith have the honour to inclose you the first of exchange for 3,164*l.* 11*s.* 8*d.*, *sterling*, at sixty days’ sight, on Messrs. *March, Sealey, & Co.*, in *London*, in favour of myself, it being the proceeds of a cargo of flour in brig *Swiftsure*, belonging to *Henry Sigourney*, Esq., of *Boston, America*, which you will please to present for acceptance, and keep at the disposal of the second or third.”

Attwood did not indorse the first bill of the set. *Williams* received the letter and bill on the 26th *September*, 1825, and procured the acceptance of the bill in due

course. The third of the set was remitted to the plaintiff below, and he having indorsed it as aforesaid—"Pay to *Samuel Williams*, Esq., of *London*, or his order, for my use," remitted it to *Williams*, in the following letter of the 17th *September*, 1825.

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"Sir,—Captain *Amasiah Attwood*, of my brig, *Swiftsure*, arrived here yesterday, from *Rio Janeiro*, whence he sailed about the middle of *July*. He informs me that he left a letter directed to you, to be forwarded to you by the next *English* mail, containing the first of *March*, *Sealey, Walker, & Co.*'s draft on *March, Sealey, & Co.*, *London*, dated 12th of *July*, at sixty days' sight, for 3,164*l.* 1*l.* 8*d.*, *sterling*, in favour of Messrs. *Hendricks, Weirss, & Co.*, and by them indorsed to the said *Amasiah Attwood*. He thinks he did not indorse the draft, and, if received, it can only be accepted; inclosed, you have the third bill of the set, indorsed to me by Captain *Attwood*, and to yourself by me. I presume, that if the other should have been previously received and accepted, that a receipt on the one now transmitted, will be accepted at maturity. Have the goodness, when you advise the receipt of the present, which I trust will be as soon as possible, to inform me the standing of the acceptors.

"*Henry Sigourney.*"

This letter, and the bill, were received by *Williams* on the 21st *October*, 1825. The plaintiffs in error (defendants below) had no notice of the before-mentioned letters of Captain *Attwood* and the plaintiff below. *Williams* stopped payment on the 24th *October*, 1825, and a docket was struck against him on the 25th of the same month, upon which a commission of bankrupt, dated the 27th of the same month, was issued, and he was duly declared a bankrupt immediately afterwards. At the time *Williams* received the bill in question, as well as at the time of his bankruptcy, the balance of account between

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him and the plaintiff below was in favour of the latter, to the amount of upwards of 3,000*l.*, exclusive of the before-stated bill. On the morning of the 22nd *October*, when the discount hereinafter mentioned was made, the balance in favour of *Williams*, with the defendants below, was 3,784*l.* 10*s.* 10*d.* About eleven o'clock on that day, *Williams* indorsed the bill in question, with others, amounting in the whole, to 7,081*l.* 7*s.* 9*d.*, to the defendants below, who were his bankers, and in the habit of discounting for him very largely, and the said bills were *bonâ fide* discounted for him, and credit given to him for the amount, less the discount; and subsequently, *viz.* at the clearing house, about five o'clock in the evening of that day, the defendants below paid *Williams's* acceptances due that day, to the number of thirty-two, and three drafts, amounting altogether, to 10,683*l.* 18*s.* 1*d.* The bill in question was honoured at maturity, and the amount received by the defendants below, on the 28th *November*, 1825.

Upon the above facts, the Court of *King's Bench* were of opinion, that the plaintiff below was entitled to recover (a), and, a writ of error having been brought by the defendants below, the case now came on for argument.

Mr. *Patteson*, for the plaintiffs in error (defendants below). It appears, that when this case was argued in the Court below, only two Judges were present, *viz.*, Lord *Tenterden*, and Mr. Justice *Bayley*; and although they were of opinion that the plaintiff below was entitled to judgment, yet that opinion cannot be supported on principle, and it is also contrary to the authority of decided cases. The question depends solely upon the terms of the indorsement by the plaintiff below to *Williams*, *viz.* pay to *Samuel Williams*, Esq., of *London*, or his order, for my use." It may be admitted as a general principle, that the indorser of a bill may restrain its negotiation by a conditional in-

(a) See 8 Barn. & Cress. 622; S. C. 3 Man. & Ryl. 58.

dorsement. But the indorsement in question is neither a restricted nor limited indorsement. The words "for my use," were not addressed to the persons by whom the bill was to be paid, or any of the previous parties to it, but to *Williams* alone, to whom it was indorsed by the plaintiff below. In the Court below, the case of *Snee v. Prescott* was referred to, where Lord *Hardwicke* said (a), "Promissory notes and bills of exchange are frequently indorsed in this manner, "Pray pay the money to my use," in order to prevent their being filled up with such an indorsement as passes the interest. Mr. *Lutwyche*, who was an experienced practiser in this Court, always did so in his bills of exchange." The words there adopted would certainly restrain the negotiability of the bill, but they are totally dissimilar from those used in the indorsement in question; for the money was not, in the first instance, to be applied to the use of the indorser, but was to be paid to *Williams*, the indorsee, or his order, who was to apply the amount of the bill to *Sigourney's* use, after he, *Williams*, had received it. In *Ancher v. The Governor and Company of the Bank of England* (b), the indorsement was, "the within must be credited to Captain *Morten Larsen Dahl*, value in account." An indorsement purporting to have been made by *Dahl*, was afterwards forged, and the Bank of *England* discounted the bill. The acceptors did not pay it: before it became due, they had failed; and a person of the name of *Fulgberg* paid it for the honour of the plaintiffs; and, upon the ground that the indorsement had restrained the negotiability of the bill, they brought an action for money had and received against the Bank of *England*, they having discounted the bill in their own wrong, and Lord *Mansfield* directed a nonsuit; but, upon a rule to shew cause why there should not be a new trial, after cause shewn, Lord *Mansfield*, Mr. Justice *Willes*, and Mr. Justice *Ashurst*, thought that the in-

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(a) 1 Atk. 249.

(b) 2 Doug. 637.

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dorsement was restrictive, and that the plaintiffs were entitled to recover; but Mr. Justice *Buller* thought otherwise: upon which Lord *Mansfield* said, the whole turned on the question, whether the bill continued negotiable; and if they altered their opinion, they would mention the case again; but it never was mentioned afterwards; and, upon a new trial, his Lordship directed the Jury to find for the plaintiffs, which they did. There, however, the indorsement was in the most restrictive terms possible, as the bill was to be credited to *Dahl's* account, to whom alone the amount could be paid; whilst here, the bill was payable to *Williams, or his order*. That, therefore, distinguishes this case from those of *Snee v. Prescott*, and *Anchor v. The Governor and Company of the Bank of England*, as by the words "*or order*," the bill was *prima facie* transferable by *Williams*, in whom the legal title was vested, and he might transfer his interest by indorsement, although as between *Sigourney*, the indorser, and himself, he might be bound to hold the amount of the bill, after he had received it for the use of the former. In *Evans v. Cramlington(a)*, which case is best reported in *Ventris*—the bill was payable to *Price*, or order, for the use of *Calvert*. *Price* indorsed it to *Evans*, after which an extent issued against *Calvert*, and the money due upon it was seized to the use of the King. These facts appearing upon the pleadings, two points were raised upon demurrer; the one, whether *Calvert* had such an interest in the money, as might be extended; and the other, whether *Price* had power to indorse the bill, or whether he had merely a bare authority to receive the money and apply it to the use of *Calvert*? The Court of *King's Bench*, and afterwards the Court of *Exchequer Chamber*, upon error, decided; that *Calvert* had not such an interest as could be extended, and that *Price* had authority to indorse the bill; and judgment was given for the plaintiff. It does not appear whe-

(a) 1 Show. 4; S. C. Skin. 264; Carth. 5; 2 Vent. 307.

ther that was a case of discount or not, but that fact is immaterial as far as regards the present, as the defendants below discounted the bill for *Williams*, *bond fide*, and carried the amount to his account, and he had then a balance in their hands in his favour, to the amount of 3,784*l*. The case of *Evans v. Cramlington*, is an express authority to shew that *Williams* had an authority to transfer his interest in the bill; and, after he had received the amount from the defendants below, on their deducting the discount in the usual way, they were not bound to shew how he appropriated the money, and *Sigourney* did not appoint it to be applied in any particular manner, but merely to his use. Even if the indorsement by *Sigourney* had been, "which place to my account," or, "which hold to my use," the defendants below would not have been bound to ascertain how the money had been applied; and, by the indorsement in question, *Sigourney*, the indorser, merely directed that the money should be applied to his use when received; and it is wholly immaterial whether *Williams*, as the indorsee, received it from the drawees; for, as Lord *Holt* said, in *Evans v. Cramlington*, as reported in *Shower* (a)—"The bill was assignable by *Price*; and, when he assigned it, he received the money, and that receipt was for the use of *Calvert*." So, here, after *Williams* received the money, and not before, he became a trustee for *Sigourney*, and he could not make the defendants below trustees for him. A contrary construction would be highly prejudicial to the commercial interests of the country, and restrain the negotiability of bills of exchange, which ought to have a free and unimpeded circulation, and if the indorsement in question can be deemed restrictive, the words, "or order," will be rendered nugatory and inoperative. In *Truettel v. Barandon* (b), the indorsement was, "Pay to *J. P. Duroure*, Esq., or order, for account of Messrs. *Truettel & Wurtz*," But there, the bills were left with the defendants by the plaintiff's agent, as a security for future advances, and not by way of dis-

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(a) 1 Show. 6. (b) 1 B. Moore, 543; S. C. 8 Taunt. 100.

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count, on which point the decision of the Court turned; for Mr. Justice *Dallas* said (a), "the bills were left with the defendants by way of security;" and Mr. Justice *Burrough* said, "there is a great difference between bills of exchange left for the purpose of being discounted, and those which are deposited as a security for future advances." Here, as the bill was payable to *Williams or order*, he had a right to negotiate it in the first instance, and all the duty imposed on him, as the general agent of *Sigourney*, was, to apply the amount to his use, after he had received it. With that, however, the defendants below had nothing to do; and, if an indorsement be intended to be restricted or limited; it should be expressed in direct words; but here, the terms are at all events ambiguous and equivocal, for it is a general rule of law, that a bill, payable to order, is negotiable, and that an indorsement of it by a party into whose hands it has got, passes the property in it to the person to whom it is indorsed. In *Robertson v. Kensington* (b), the indorsement was, "pay the within sum to Messrs. Clerk and Ross, or order, upon my name appearing in the *Gazette*, as ensign in any regiment of the line, between the 1st and 64th, if within two months from this date." There, too, the payee annexed the condition to his indorsement, previously to the acceptance, and therefore the drawee was held to be bound by it. On these grounds, the plaintiffs in error are entitled to judgment.

Mr. *F. Pollock*, for the defendant in error.—It has been admitted, that the negotiability of a bill of exchange may be restrained by an indorsement; and here, the indorsement by the plaintiff below was limited in its terms, so as to prohibit *Williams*, the indorsee, from transferring any interest he might have in the bill, beyond the particular purpose mentioned in such indorsement, *viz.* that the amount of the bill was to be paid to *Williams for the use of*

(a) 1 B. Moore, 546.

(b) 4 Taunt. 30.

the plaintiff below. The *dictum* by Lord *Hardwicke*, in *Snee v. Prescott*, is expressly in point, to shew that a blank or general indorsement may be converted into a special one, so as to prevent the interest in a bill from passing beyond a particular individual, except for a particular purpose, or subject to a certain condition: and, in the case of *Edie v. The East India Company*, Mr. Justice *Wilmot*, in treating of an indorser of a bill, said (a): "To be sure, he may give a mere naked authority to a person to receive it for him, he may write upon it, 'pray pay the money to my servant for my use;' or use such expressions as necessarily import, that he does not mean to indorse it over, but is only authorizing a particular person to receive it for him, and for his own use. In such case, it would be clear that no valuable consideration had been paid him: but, at least, that intention must appear upon the face of the indorsement." In *Ancher v. The Bank of England*, where the indorsement was, "the within must be credited to Captain *M. L. Dahl*," was held to be a restrictive indorsement; and, in *Robertson v. Kensington*, an indorsement "to pay the contents to *A. B.*, on the indorser being gazetted ensign within a given time," was held to be restrictive, and would not confer on a subsequent indorsee any right, unless the party was so gazetted. In *Truettel v. Barandon*, Lord Chief Justice *Gibbs* thought, at the trial, that the indorsement restricted the negotiability of the bill. All these cases are express authorities to shew, that a restrictive indorsement precludes the person in whose favour it is made, from making a transfer, so as to give a right of action against either the person making it, or any of the antecedent parties. Here, the words, "or order," do not enlarge the import of the indorsement, but merely empowered *Williams*, as trustee for *Sigourney*, to authorize a third person to receive the amount of the bill, when at maturity, which, but for these words, he must have presented himself. At all events,

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(a) 2 Burr. 1227.

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the words, *to my use*, immediately following those of "*or his order*," must be taken to operate as a notice, that the property in the bill was in the person to whose use its amount was to be applied, and the person who receives it from the ultimate indorsee or holder, ought to make inquiries, or endeavour to ascertain the nature of his interest. In *Gill v. Cubitt* (a), it was held, that a broker who discounts bills of exchange, is bound to use due caution, and make the necessary inquiries of the person who brings them to be discounted; and Lord Chief Justice Abbott said (b): "It appears to me to be for the interest of commerce, that no person should take a security of this kind from another without using reasonable caution." And Mr. Justice Holroyd said (c): "If a bill be drawn upon parties of respectability, capable of answering it, and another person discounts it, merely because the acceptance is good, without using due caution, and without inquiring how the holder came by it, I think that the law will not, under such circumstances, assist the parties so taking the bill, in recovering the money." Here, if a stranger had brought the bill to be discounted, the defendants below would necessarily have looked at the indorsements on the back of it, from which it would appear that *Williams* was merely an agent or trustee for *Sigourney*, as it was to be paid *for his use*. But as *Williams* had authority to indorse the bill, the drawees were warranted in paying its amount to the defendants below, still they could only receive it for the use of the plaintiff below; and the judgment of the Court below must be affirmed.

Mr. *Patteson*, in reply.—The bill was clearly negotiable, and as it was payable to *Williams* or *his order*, he had a right to indorse it. The case of *Gill v. Cubitt* has given great alarm to the commercial world, but is distinguishable from the present, as the Jury found, that

(a) 3 Barn. & Cress. 466; S. C.
 5 Dow. & Ryl. 324.

(b) 3 Barn. & Cress. 471.
 (c) Id. 477.

the bill was *bond fide* discounted for *Williams* by the defendants below, who were his bankers, and in the habit of discounting for him very largely; whilst, in *Gill v. Cubitt*, the bill was presented to the broker by a person whose name he did not know; but the bill was discounted, as the broker was satisfied with the name of the acceptor. And as the defendants below gave *Williams* the full amount of the bill, the judgment of the Court below cannot be supported on a *bond fide* transaction between them.

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Lord Chief Justice BEST delivered the judgment of the Court as follows:—

This was an action for money had and received, and brought to recover the proceeds of a bill of exchange which the defendants below discounted for one *Williams*. The bill was drawn by *March, Sealey, Walker, & Co.* at *Rio Janeiro*, payable to the order of Messrs. *Hendricks, Weiss, & Co.*, who indorsed it to *Attwood*, or order, who indorsed it to *Sigourney*, the plaintiff below (defendant in error), or order, who indorsed it to *Samuel Williams*, or his order, for the use of him *Sigourney*. We are all of opinion that the latter was a special indorsement, and restrained the negotiability of the bill. The manifest object of *Sigourney* was, to prevent the money received in respect of the bill, from being applied to the use of any other person than himself. Whoever, therefore, received the money, received it for the use of *Sigourney*, and, as the defendants below (plaintiffs in error) took the bill upon the general indorsement of *Williams*, and upon his account, it having been indorsed to him by *Sigourney* for a special purpose, *vis.* to receive the money for his use, *Williams* could not confer a larger interest than *Sigourney* had given him, which was a mere trust; and as the defendants below did not receive the bill on those terms, but discounted it for *Williams* on his general indorsement, they did so in their own wrong. If they had looked at *Sigourney's* indorsement on the back of the bill, they

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would have discovered that *Williams* was merely a trustee for *Sigourney*, or that the bill was indorsed to the former for a limited purpose, *vis.* to receive the money when the bill became due, and hold it to the use of him, *Sigourney*, for whose benefit alone the amount was to be applied; and into whatever hands the bill might travel, the party receiving it must take it subject to this trust, which was apparent upon the instrument itself. No inconvenience can possibly arise to the commercial interests of the country, by limiting the operation of an indorsement so expressed;—the only effect will be, to make persons more cautious in transactions of this nature in future. Unless the words “*for my use*” have no meaning, it is obvious, upon looking at the indorsement, that some inquiry was necessary to have been made; and if a meaning can be found for those words, the Court must apply them so as to meet the object and intention of the indorser, which were, that *Williams* should hold the bill as his agent, and receive the proceeds for his use. But it has been said, that, by holding the indorsement to be restrictive, we shall render the words “*or order*” altogether inoperative. If they had not been introduced, *Williams* must have attended in person to present the bill for payment, or given a power of attorney to a third person to receive the amount for him; but, to obviate that inconvenience, the words *or order* were inserted. *Sigourney* only intended that *Williams* should receive the amount for his, *Sigourney's*, use, and that intention was defeated by the defendants below (plaintiffs in error), who have received the money from the drawees; and, instead of paying it over to *Williams* for the use of *Sigourney*, they paid it to *Williams* without imposing any terms upon him, and for whose use alone they discounted the bill. We are, therefore, all of opinion, that the judgment of the Court below must be—

Affirmed.

CASES
ARGUED AND DETERMINED
IN THE
Courts of Common Pleas
AND
Exchequer Chamber,
IN TRINITY TERM,

IN THE TENTH YEAR OF THE REIGN OF GEORGE IV.

MEMORANDA.

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IN the course of the last vacation, Sir *William Draper Best*, Knight, resigned the office of Chief Justice of this Court, and was created a Peer of the realm, by the title of Baron *Wynford*, of *Wynford Eagle*, in the county of *Dorset*:—He was succeeded by Sir *Nicholas Conyngham Tindal*, Knight, who was called to the degree of Serjeant at Law, and gave rings with the motto, “*Quid leges sine moribus?*” He took his seat in Court on the first day of this Term.

Sir *Charles Wetherell*, Knight, his Majesty’s Attorney-General, resigned his office, and was succeeded by Sir *James Scarlett*, Knight.

Edward Burtenshaw Sugden, Esq., was appointed his Majesty’s Solicitor-General, in the room of Sir *Nicholas Conyngham Tindal*, and was knighted accordingly.

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Saturday,
June 20th.

The names of the plaintiff and defendant in the original action must be continued in the case of bail in error, until the transcript of the record is carried over to the Court of error.

SMITH'S BAIL.

MR. Serjeant *E. Lawes* opposed the justification of bail in error, in this cause, on the ground that the names of the plaintiff and defendant in the original action were inserted in the notice of bail.

Mr. Serjeant Wilde, contra, insisted that this was conformable to practice.

The clerk of the errors, who attended in Court with the bail-book, stated the practice to be, that, after a writ of error is brought and allowed, the names of the plaintiff and defendant in the original action are continued in the notices of bail and exception, and the rule to certify, until the transcript of the record is carried over and filed; and that then the names of the parties must be reversed.

The bail, swearing to property to the amount required, were permitted to justify accordingly (a).

(a) See *Gandell v. Rogier*, 4 Edit. Vol. 2, 1161; 9 B. Moore, Barn. & Cress. 862; S. C. 7 Dow. 579, n. & Ryl. 259; Tidd's Practice, 9th

Wednesday,
June 22nd.

MILLS v. COLLETT, Clerk.

THIS was an action of trespass for an assault and false imprisonment. The declaration stated, that the defendant, if a person be charged on oath before a magistrate with an offence amounting to felony, and he issues his warrant, and, on the party being brought before him, the charge is substantiated, and the offender is committed to prison, the magistrate committing is not liable in trespass for false imprisonment, although the charge turns out to be unfounded. Where, therefore, a party was charged under the statute 7 & 8 Geo. 4, c. 30, s. 19, with having maliciously cut down a tree, adjoining a dwelling-house, and was committed to prison as a felon, and the person who laid the information did not prosecute:—*Held*, that the magistrate was not liable in trespass, although it appeared on the face of the depositions under which the party was committed, that he was the occupier of the land on which the tree grew.

A justice of the peace should not allow depositions to be framed in the words of a charge in a statute under which the party is committed.

In a notice of action to a magistrate, the residence of the plaintiff's attorney was described as of *Half Moon Street, Piccadilly, London*. *Quare*, whether it was sufficient? *Half Moon Street* being in the county of *Middlesex*.

ant, on the 18th *October*, 1827, made an assault upon the plaintiff, at *Chediston*, in the county of *Suffolk*, and forced and compelled him to go out of a certain dwelling-house there, into a public highway, and from thence to a certain prison, situate at *Beccles* in that county, and there imprisoned the plaintiff, and kept and detained him in prison there, without any reasonable or probable cause, for the space of four months then next following; whereby the plaintiff was not only greatly exposed and injured in his credit and circumstances, but hindered and prevented from performing and transacting his lawful and necessary affairs and business. Plea—Not guilty.

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At the trial, before Mr. Baron *Vaughan*, at the last Assizes for the county of *Suffolk*, it appeared that the defendant was one of the magistrates of that county, and that the plaintiff had been brought before him on a charge of having unlawfully and maliciously cut down a timber tree, in the parish of *Chediston*. It appeared by the evidence adduced for the plaintiff, that he occupied a farm in that parish, and that, on the 18th *October*, 1827, a warrant was issued by the defendant and Mr. *Browne*, another magistrate of the county of *Suffolk*, on a complaint made against the plaintiff upon oath by one *Balls*, one of the churchwardens of *Chediston*. The information was as follows:—

“*Suffolk, to wit.*—The information and complaint of *Robert Balls*, of *Chediston*, in the county of *Suffolk*, gentleman, made on oath before us, two of his Majesty’s justices of the peace in and for the said county of *Suffolk*, the 17th *October*, 1827; who saith, that, on the 15th day of *October*, instant, in the parish of *Chediston*, in the said county, *Simon Mills*, of *Chediston*, aforesaid, farmer, and *Abraham Hammond*, of the parish of *St. James’s, South-Elmham*, in the said county, labourer, did, wilfully and maliciously, cut, break, bark, root up, or otherwise destroy and damage, a certain timber elm tree, growing in

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a yard adjoining to the dwelling-house belonging to a farm in *Chediston*, aforesaid, of the value of 1*l.* and upwards, the property of *John Badeley*, Doctor of Physic, contrary to the statute made in the 7th and 8th years of the reign of King *George* the 4th, intituled, "An act for consolidating and amending the laws in *England*, relative to malicious injuries to property;" and thereupon, he, the said informer, prayeth the judgment of us, the justices aforesaid, in the premises.

Robert Balls.

Taken and sworn before us, *Anthony Collett*, (L.S.)
L. R. Browne. (L.S.)"

That the plaintiff voluntarily appeared before the magistrates at *Yoxford*, on the 18th *October*, when the following depositions were taken by the magistrate's clerk.

"*Suffolk, to wit* :—The deposition of *Robert Balls*, wheel-right, of the parish of *Chediston* in the county of *Suffolk*, taken and made upon oath before us, two of his Majesty's justices of the peace for the said county, this 18th day of *October*, 1827, who saith, that he knows the certain elm tree cut down by *Simon Mills*, of *Chediston*, aforesaid, farmer, and *Abraham Stannard*, of the parish of *St. James, South-Elmham*, labourer, on the premises of the said *Simon Mills*; and that it is worth more than 1*l.* sterling.

Robert Balls.

Before us *L. R. Browne*, (L.S.)
A. Collett. (L.S.)"

"*Suffolk, to wit* :—The deposition of *John Storkey*, husbandman, in the parish of *Linstead Parvor*, in the county of *Suffolk*, taken and made upon oath before us, two of his Majesty's justices of the peace for the said county, this 18th day of *October*, 1827; who saith, that, on *Monday* last, the 15th day of the present month of *October*, on the premises occupied by *Simon Mills*, in the parish of *Chediston*, in the said county, the property of *John Bade-*

ley, Doctor of Physic, namely, in the yard adjoining and belonging to the dwelling-house of the said premises; he saw *Simon Mills* of *Chediston*, aforesaid, and *Abraham Stannard*, labourer, of the parish of *St. James, South-Elmham*, wilfully and maliciously cutting, breaking, barking, rooting up, and otherwise destroying a certain timber elm tree, the property of the said *John Badeley*.

John Storkey, ✕ (his mark.)

Before us,

L. R. Browne, (L. S.)

A. Collett. (L. S.)"

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That the plaintiff was, thereupon, committed to *Beccles* gaol, to take his trial for felony, and the prosecutor and witnesses bound over in recognizances, to prosecute and give evidence. That the plaintiff remained in custody among felons, until the *Epiphany* Sessions, which were held in *January*, 1828, being three months from the date of the commitment, when he was discharged upon application to the Court, a compromise having been entered into between him and *Balls*, the prosecutor. It was admitted by the plaintiff's counsel, that no malice was imputable to the defendant; but it was contended, that he had been guilty of an error in judgment, and that the plaintiff was entitled to recover a compensation in damages, for the imprisonment he had suffered in consequence of his commitment.

The defendant called no witnesses, but it was submitted for him, that this action could not be maintained, on the ground that the offence with which the plaintiff was charged was a felony, by virtue of the statute 7 & 8 *Geo.* 4, c. 30, s. 19 (a), and that the magistrates had, for any thing

(a) By which it is enacted—
“That, if any person shall unlawfully and maliciously cut, break, bark, root up, or otherwise destroy or damage the whole or any part of any tree, sapling, or shrub, or any underwood, respectively growing in any park, plea-

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that appeared on the face of the depositions, full power and authority to commit the plaintiff; and, as there was no proof of malice by the defendant, he could only be charged with an error in judgment, for which he could not be liable to the plaintiff in this action.

It was also objected for the defendant, that the plaintiff had not complied with the directions of the statute 22 Geo. 2, c. 44, which was passed for the purpose of rendering Justices of the Peace more safe in the execution of their office, and which enacts, that, "at the back of all notices of action against magistrates, the name and place of abode of the plaintiff's attorney or agent must be indorsed."

The notice of action to the defendant was signed at the foot by the plaintiff's attorney, and it was contended that his place of abode was not correctly stated:—*Half Moon Street, Piccadilly*, being described as in *London*, instead of the county of *Middlesex*.

The learned Baron proposed, either to direct a verdict to be entered for the plaintiff, reserving leave to the defendant to move to enter a nonsuit; or to nonsuit the plaintiff, with liberty for him to move to set it aside, and that a verdict might be entered in his favour: but, upon the defendant's counsel pressing for a nonsuit, the learned Judge proposed, with a view of saving the parties the ex-

sure ground, garden, orchard, or avenue, or in any ground adjoining or belonging to any dwelling house, every such offender (in case the amount of the injury done shall exceed the sum of 1*l*), shall be guilty of felony, and being convicted thereof shall be liable, at the discretion of the Court, to be transported beyond the seas for the term of seven years, or to be imprisoned for any term not exceeding two years; and, if any person shall unlawfully and maliciously cut, break,

bark, root up, or otherwise destroy or damage the whole, or any part of any tree, sapling, or shrub, or any underwood, respectively growing elsewhere than in any of the situations hereinbefore mentioned, every such offender (in case the amount of the injury done shall exceed the sum of 5*l*), shall be guilty of felony, and being convicted thereof shall be liable to any of the punishments which the Court may award for the felony hereinbefore last mentioned."

pense of a second trial, that the Jury should then decide upon the *quantum* of damages, to which the plaintiff might be entitled in case the Court should be of opinion that the action was maintainable; whereupon, the defendant's counsel addressed the Jury, and contended that the defendant was not only fully justified in what he had done, but that he would have been guilty of a dereliction of duty, if he had not committed the plaintiff on the information laid by *Balls*, and the depositions in support of it; inasmuch, as the statute constituted the alleged offence a felony.

The Jury having found a verdict for the plaintiff, damages, one farthing; a nonsuit was directed to be entered, leave being reserved to the plaintiff to move the Court to set it aside, and that a verdict might be entered for him, for the amount of the damages found by the Jury.

Mr. Serjeant *Storks*, in the last Term, accordingly obtained a rule *nisi*, and, in addition to the objections raised for the plaintiff at the trial, submitted that there was no ground whatever to commit the plaintiff for a felony, as it appeared on the face of the depositions, that the tree alleged to have been cut down, stood on premises in the occupation of the plaintiff; and the Legislature did not intend, or even contemplate, that the statute 7 & 8 Geo. 4, should apply to a case of landlord and tenant, or to a person in the actual occupation of premises, unless it were shewn that the tree cut down was expressly excepted by a clause in the demise; and here the defendant must or ought to have been aware, that the plaintiff could not have committed a wilful trespass within the meaning of the act; and, as he caused him to be committed without any colourable ground for so doing, he is liable to the plaintiff for the injury he sustained by so long and unjustifiable an imprisonment.

Mr. Serjeant *Wilde* and Mr. Serjeant *Russell* now

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shewed cause.—The first, and indeed the only material question which arises in this case is, whether, under the circumstances, any error of judgment is imputable to the defendant, or whether he has put a misconstruction on the 19th section of the statute 7 & 8 *Geo.* 4, c. 30, the provision of which was substituted for the black act, 9 *Geo.* 1, c. 22, s. 1, which made the offence capital, where the malice was personal to the owner, and the 6 *Geo.* 3, c. 36, and 6 *Geo.* 3, c. 48; by the first of which, if the offence were committed in the night time, it was felony; and, by the last, if done at any other time, it was punishable by summary conviction, for the first and second offences. The present case clearly falls within the operation and meaning of the statute 7 & 8 *Geo.* 4; for the word “*maliciously*,” cannot have a different signification than it had under the statute 6 *Geo.* 3, c. 36, upon which it was considered as bearing its most general signification, and as applying to an act done *malo animo*, from an original desire of gain, or a careless indifference of mischief (*a*). Malice, in a legal sense, does not signify, according to its common acceptance, a desire of revenge, or a settled anger against a particular person. It does not appear what interest the plaintiff had in the premises on which the tree was cut down; but even if there were an existing tenancy, it would not divest the magistrate of his jurisdiction. The plaintiff had clearly been guilty of a wrongful act against the person who had the right of property in the tree, and he offered no excuse before the magistrates for having cut it down. Felony may be committed in respect of demised property, as in arson, under the statutes, though not at common law; and in larceny of chattels and fixtures let to tenants and lodgers, by the statute 7 & 8 *Geo.* 4, c. 29, s. 45. Suppose valuable or ornamental trees;—for instance an avenue, to have been cut down maliciously, by a tenant or occupier, it is quite

(*a*) East's Pleas of the Crown, Vol. 2, 1062.

clear that it would fall within the meaning and spirit of the act, and that he would be liable to be punished accordingly. Enough, therefore, appeared upon the face of the information and depositions, to lead the magistrates to suppose that they had jurisdiction to commit the plaintiff for the offence with which he was charged, and it was not for them to decide on the law, as they were merely authorized to commit. But, even if the defendant, acting in his official character as a magistrate, had been guilty of an error in judgment, he is not liable to an action; for in *Hawkins's Pleas of the Crown*, it is said (a): "Justices of the Peace are not punishable civilly for acts done by them in their judicial capacities; but, if they abuse the authority with which they are entrusted, they may be punished criminally at the suit of the king, by way of information. But, in cases where they proceed ministerially rather than judicially, if they act corruptly, they are liable to an action at the suit of the party, as well as to an information at the suit of the king." Again, it is said (b): "Perhaps there may be this difference between the warrant of a Justice of Peace for such causes which he has not authority to hear and determine as Judge, without the concurrence of others; and such warrant for an offence which he may so determine without the concurrence of any other; that, in the former case, inasmuch as he rather proceeds ministerially than judicially, *if he act corruptly*, he is liable to an action at the suit of the party, as well as to an information at the suit of the king; but, in the latter case, he is punishable only at the suit of the king; for that, regularly, no man is liable to an action for what he doth as Judge." At all events, there must be either malice, or a corrupt motive imputable to a magistrate, to make him liable to an action. In *Windham v. Clere* (c), an action on the case

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(a) Book 2, c. 8, XVII. s. 74, s. 20.
 8th edit. by Curwood. (c) Cro. Eliz 130; S. C. 1 Leon.
 (b) Hawk. P. C. Book 2, c. 13, 187.

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was brought against the defendant as a Justice of the Peace, for maliciously issuing his warrant, in which it was alleged that the plaintiff was accused of stealing a horse, whereas, in truth, the plaintiff never was accused, nor did he steal the horse, and the defendant knew him to be guiltless. The plaintiff had a verdict, and *Clench, J.*, and *Gawdy, J.*, held that the action was maintainable, and they said, "If a man *be accused* to a Justice of the Peace for an offence, for which he causeth him to be committed by his warrant, although the accusation be false, yet he is excusable; but, if the party be *never accused*, but the Justice, of his malice and his own head, cause him to be arrested, it is otherwise." *Morgan v. Hughes* (a), is an authority to shew that where a Justice *maliciously* grants a warrant against a person *without* any information, upon a supposed charge of felony, an action of trespass will lie; but no case can be found where such action has been attempted to be brought without an imputation of corrupt motives or malicious intent. In *Lowther v. The Earl of Radnor* (b), it was held, that trespass does not lie against Justices of Peace acting upon a complaint made to them upon oath, by the terms of which they have jurisdiction, although the real facts of the case might not have supported such complaint, *if such facts* were not laid before them *at the time*.

With respect to the objection which has been raised as to the sufficiency of the notice, it must be precise in terms; and the statute by which it is required, has always received a strict construction. In *Lovelace v. Curry*, Mr. Justice *Lawrence* said (c), "that the Court decided in *Taylor v. Fenwick*, that the statute has prescribed a form which must be implicitly followed, and it admits of no equivalent. The statute was made to introduce a strict-

(a) 2 Term Rep. 225.

(b) 8 East, 113.

(c) 7 Term Rep. 635.

ness of form in favour of Justices, and it must be observed literally." But the case of *Stears v. Smith* (a), is expressly in point. That was an action of trespass against a magistrate for breaking and entering the plaintiff's house, and searching it without authority, and injuring his goods. The plaintiff gave in evidence a notice pursuant to the statute, and in which the plaintiff's attorney was described as of *New Inn, London*; and it being objected for the defendant (it having been ascertained that the residence of the plaintiff's attorney was *New Inn* near *St. Clement's* in the *Strand*) that *New Inn* was in *Westminster*, and not in *London*, and, therefore, that it was a misdescription of the attorney's residence: Lord *Ellenborough* held the objection to be sufficient, and the plaintiff was nonsuited. *Half-Moon Street, Piccadilly*, is in the county of *Middlesex*, and not in *London*; and in *Aked v. Stocks*, which was an action against two magistrates, for unlawfully convicting the plaintiff, and there was a variance in the warrant as set out in the notice, Mr. Justice *Park* said (b), "these notices have always received a strict construction." And, although in *Ditcham v. Chivis* (c), it was contended that the word *London* was not to be confined to the city of *London*; yet, that was the case of a contract by a coach proprietor, to carry passengers from *London* to *Blackheath*, and the word *London* was painted on the coach, which was licensed to run from *Charing Cross* to *Greenwich* and *Blackheath*, and back again.

Mr. Serjeant *Storks*, in support of his rule.—Although no corrupt motive or personal malice may be imputable to the defendant, yet the plaintiff is entitled to recover damages for the injury he has sustained by his commitment and incarceration in gaol; and, as he was the tenant or occupier of the estate on which the tree was cut down, he could not

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(a) 6 Esp. Rep. 138.

(b) 1 Moore & Payne, 352.

(c) Id. 735.

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even be deemed a trespasser, much less of having committed a wilful trespass; and, if so, it is quite clear that the defendant had no jurisdiction or authority to commit him. Besides, it appears on the face of the depositions, that the premises were occupied by the plaintiff, and the deposition of *Storkey*, a labourer, was framed according to the precise words of the act. It must therefore be assumed, that it was drawn up by the magistrate's clerk, without any regard to what fell from the witness at the time; and, if the defendant had read the depositions, he would necessarily have seen that the plaintiff had not been guilty of an offence within the meaning or spirit of the act. In *Crepps v. Durden (a)*, it was held, that a person can commit but one offence on the same day, by exercising his ordinary calling on a *Sunday*, contrary to the statute 29 *Car. 2*, c. 7, and that a magistrate having convicted a party in more than one penalty for the same day, it was *an excess* of jurisdiction, for which he was liable in an action of trespass. That case is far stronger than the present, as here the defendant acted without jurisdiction; and the statute 7 & 8 *Geo. 4*, must receive a strict construction, as it gives magistrates new and extensive powers, and operates in restraint of the liberty of the subject. In *Davis v. Capper (b)*, the plaintiff, a respectable female, brought trespass against the defendant, a magistrate, for having committed her to prison for sixteen days, on a charge of theft, of which she was innocent; and Mr. Justice *Gaselee*, who tried the cause, having directed a nonsuit, on the ground that the defendant was warranted as a magistrate in committing the plaintiff, the Court of *King's Bench*, after argument, directed a new trial.

With respect to the notice, the object of the Legislature in passing the statute 24 *Geo. 2*, was, that the magistrate or party sued should have due notice of the residence of the plaintiff's attorney, in order that he might ten-

(a) Cowp. 640.

vis v. Russell, 2 Moore & Payne,

(b) Not reported. See also *Da-* 590.

der amends if he thought fit so to do. In common parlance, the word *London* applies to the suburbs or environs, as well as to the city itself; and *Piccadilly, London*, was less likely to mislead, than *Piccadilly, Middlesex*. The case of *Stears v. Smith*, is a mere *Nisi Prius* decision; and in *Greenway v. Hurd*, Lord *Kenyon* said (a), "it has been frequently observed by the Courts, that the notice which is directed to be given to Justices and other officers, before actions are brought against them, is of no use to them where they have acted within the strict line of their duty, and was only required for the purpose of protecting them in those cases, where they intended to act within it, but, by mistake, exceeded it." In *Crooke v. Curry* (b), Mr. Baron *Thomson* held that the attorney's name and place of abode, being in the body instead of on the back of the notice, was sufficient, on the ground of the intent of the statute being that the magistrate might be enabled to tender amends to the party or his attorney, and that if the attorney giving the notice described himself generally of the town in which he resided, *viz.* as of *Bolton en le Moor*, it was sufficient. So, in *Osborn v. Gough* (c), where the place of abode of the plaintiff's attorney was described as "of *Birmingham*," it was deemed sufficient; and Lord Chief Justice *Alvanley* said, "the interpretation which I put upon the statute is this, that if the place indorsed upon the notice be the true place of the attorney's abode, it lies on the defendant to shew that such description has not afforded him the opportunity of taking advantage of the Act of Parliament:" and here, *Half Moon Street, Piccadilly*, would have been a sufficient notice, without the addition of the word *London*; but even if it were not, it is a more appropriate address than *Piccadilly, Middlesex*.

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(a) 4 Term Rep. 555.

by Chetwynd, Vol. 3, 171.

(b) Burn's Justice, 24th edit.

(c) 3 Bos. & Pul. 550.

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Lord Chief Justice TINDAL.—I am of opinion that this rule must be discharged. The plaintiff has charged the defendant, a magistrate, with trespass and false imprisonment, for having committed the plaintiff to gaol, to take his trial before Justices at Sessions, for an offence alleged to have been committed by him, which, if substantiated, would have amounted to felony; and the only question is, whether, under the circumstances, the defendant, as such magistrate, had jurisdiction to investigate the charge, and, having done so, to commit the plaintiff to prison. The information charges the plaintiff with having committed a felonious offence within the terms of the statute 7 & 8 Geo. 4, c. 30, *viz.* as having wilfully and maliciously cut, broken, barked, rooted up, or otherwise destroyed, a timber tree, growing in a yard belonging to a dwelling-house, of the value of 1*l.* and upwards, the property of Dr. *Badeley*. A specific punishment is pointed out by the statute for an offence of this description, *viz.* transportation, or imprisonment. The question then is, whether, on a charge being made of a distinct and substantive felony, the magistrate is liable as a trespasser, or answerable for the correctness of the charge, if the case be disposed of as in other instances, where the magistrate is called upon to act. It would be a most dangerous doctrine to hold that he would be liable in such a case; and it would also be against the current of authorities. The statute does not give the magistrate an exclusive jurisdiction or power to convict, but merely to commit the party for trial, in case the charge alleged against him should be substantiated or made out on oath. The case of *Windham v. Clere* appears to me to be in point, and according to the report in *Croke Elizabeth*, *Clench, J.*, and *Gawdy, J.*, said, that (a), "if a man be accused to a Justice of the Peace for an offence, for which

(a) Cro. Eliz. 130.

he causeth him to be arrested by his warrant, although the accusation be false, yet he is excusable." Unquestionably, the charge does not appear to have been made in the regular course, as the depositions of the party who came before the defendant to substantiate the alleged charge, were framed in the precise words of the statute, which could not have been the language of the witnesses. But that alone will not make the defendant's conduct malicious. It has been said, however, that, as it appeared on the face of the depositions, that the plaintiff was the occupier of the premises on which the tree was cut down, it necessarily took the case out of the statute, and ousted the magistrate of his jurisdiction. To that proposition, however, I cannot accede. If trees growing on a farm are reserved to the lessor, or are expressly excepted in a lease, if the tenant cut them down, he would clearly be a trespasser, although he might not be guilty of waste, as they did not form the subject-matter of demise. If, therefore, the tenant or occupier would be liable in trespass, I am not prepared to say that he might not be criminally answerable, as the nature of the offence might, in a great measure, depend on the intent manifested at the time of cutting down the tree. But, in the view I take of this case, it is not necessary to decide that point, for the plaintiff was directly charged with an offence within the terms of the statute; and over which the magistrate had jurisdiction. The offence might, and, for any thing that appears to the contrary, was committed; and when the plaintiff was brought before the defendant, he was to exercise his own judgment on the case, and is not liable for a mere error in judgment; and as he had jurisdiction to commit, he is not liable in this action. This case may be distinguished from *Crepps v. Durden*, as there the magistrate, having convicted for one penalty, had no jurisdiction; he was *functus officio*, as the party could only be convicted in one penalty, although he had committed divers offences on the

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same day. Here, however, the defendant had jurisdiction; and unless the plaintiff had shewn that he had acted from a malignant motive in committing him, or from a malicious feeling towards him, he ought not to be liable in this action. I decline expressing any opinion as to the sufficiency of the notice, as on the main question this rule must be discharged.

Mr. Justice PARK.—I am of the same opinion. A magistrate, acting as such, under a statute giving him jurisdiction, is not liable to an action of trespass, unless he exceed his jurisdiction. Here, the statute constituted the offence with which the plaintiff was charged, a felony, and when he was brought before the magistrate, he had jurisdiction to commit him; and, according to Sir *Edward Clere's case*, which appears to have come under the consideration of all the Judges, the defendant would be excusable in committing the plaintiff, although the accusation should turn out to be false. Here, no imputation has been attempted to be cast on the defendant, and there can be no doubt but that he acted *bonâ fide*, and in the due discharge of his duty. The case of *Crepps v. Durden* is distinguishable from the present, on the ground stated by my Lord Chief Justice, as the magistrate *having convicted* in one penalty, had no jurisdiction to convict for others. This case embraces a subject of general importance to magistrates and their clerks. The practice of framing depositions in the words of a clause in an Act of Parliament cannot be too highly reprobated; and here, the witness *Storkey*, a husbandman and marksman, is stated to have deposed, that he saw the plaintiff, wilfully and maliciously cutting, breaking, barking, rooting up and destroying a tree, in the very words of the act. Still, that does not render the defendant liable, as he had the depositions before him, which contained a charge, authorizing the defendant to commit the plaintiff to gaol to take his trial for the alleged offence at the ensuing Sessions of the Peace.

Mr. Justice BURROUGH.—It is quite clear, that if a magistrate has jurisdiction, as the defendant had in this case, he cannot be liable in an action of trespass, nor in any form of action, for a mere mistake in a matter of law. The statute 7 & 8 *Geo.* 4, describes the nature of the offence which gave the magistrate jurisdiction, and the information of the party, as well as the depositions establishing the charge against the plaintiff, fell expressly within the terms and meaning of the act. Whether a party in the *occupation* of premises could be deemed guilty of felony, for cutting down a tree growing thereon, was a question of law and not of fact, and the act was deposed to. I fully agree with the Court in thinking, that it is highly improper to frame depositions in the terms of a statute, and the magistrates should be answerable for the acts of their clerks; for the depositions should contain not only the language of the witnesses, but all the material facts to which they depose. But, although a magistrate may be answerable for the misconduct of his clerk, the defendant is not liable in this form of action. If the plaintiff had brought a special action on the case, the sequel might have been different. On that, however, I do not now feel it necessary to express an opinion, as I agree with the Court in thinking that this rule must be discharged.

Mr. Justice GASELEE.—I am extremely sorry to agree in the opinion expressed by my Lord Chief Justice and my two learned Brothers, that this action cannot be maintained. The words of the statute under which the plaintiff was committed, are general, and not limited or confined to persons in relative situations of life, but extend to the public at large; nor does the act contain any exception as to malicious injuries committed by tenants or occupiers, against their landlords; for the words are—"if *any person* shall unlawfully and maliciously cut, destroy,

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or damage the whole or any part of any tree, growing in any ground adjoining or belonging to a dwelling house, if the injury done shall exceed 1*l*., he shall be guilty of felony." The defendant acted on his general authority as a magistrate, and, by virtue of the statute, he was empowered to inquire whether the offence with which the plaintiff was charged, would justify his commitment. The party making the information alleged, that the plaintiff had been guilty of an offence directly within the terms of the statute, *viz.* of having wilfully and maliciously destroyed a tree, contrary to the statute; and if there were a probability that the act done amounted to a felony, the defendant was bound to commit, as in an ordinary case. If the plaintiff had been charged on a suspicion of having committed murder, and it should eventually turn out that no murder had been committed, or that it was committed by another, the magistrate would not be liable in trespass for having caused the accused party to be committed to take his trial for the crime imputed to him. The case of *Cripps v. Durden* is distinguishable, as there, the magistrate had a power not only to investigate the nature of the complaint, but to *convict* the party charged with the offence; and having convicted, his jurisdiction ceased, as the party had only incurred one penalty, although he had committed divers offences on the same day. Here, however, the defendant had jurisdiction to inquire into the nature of the offence with which the plaintiff was charged; and by the terms of the information, and depositions in its support, it fell expressly within the terms of the statute. Although I entertain a very strong opinion with regard to the objection which has been raised as to the sufficiency of the notice, it is unnecessary now to express it. The case of *Stears v. Smith*, although a mere *Nisi Prius* decision, was determined by Lord *Ellenborough*, who nonsuited the plaintiff, and it does not appear that any application was afterwards made to the Court to set it aside. But, on the

other ground, I concur with the Court in thinking that this rule must be—

Discharged.

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GORING v. EDMONDS the Elder.

THIS was an action of *assumpsit* on a guarantie on the sale of timber.

At the trial, before Lord Chief Justice *Tindal*, at *Westminster*, at the Sittings after the last Term, the plaintiff produced the following agreement, which had been entered into by the defendant's son.

" April 20, 1825.

" Agreement between *Charles Goring, Esq.*, and *Thomas Edmonds, jun.*—

" I, *Thomas Edmonds*, of *Steyning*, agree to purchase so many oak trees as are marked, and shall be marked by us, at *Olbourne* and *East Grimstead*, at the price of 10*l.* per load, girth measure of fifty feet by the load. But should Mr. *Markwich*, when he measures the same, consider the sum of 10*l.* per load not a sufficient price, he is to fix such price as he considers it to be worth. And I hereby agree to pay the price he shall fix upon, though it shall exceed 10*l.* per load. And further, I agree not to remove the timber or bark without the consent in writing of *Charles Goring, Esq.*, (the plaintiff), from off the said estates where the said timber shall be cut; and whatever securities I may give to *Charles Goring, Esq.*, to induce him to consent to the timber and bark being taken away, shall be taken up and discharged, half at *Michaelmas*, and the other half at *Christmas* next at furthest.

" *Thomas Edmonds, jun.*"

Wednesday,
May 31st.

The defendant guaranteed the payment of the price of certain timber sold by the plaintiff to the defendant's son. The plaintiff received part payment from the son, and afterwards made repeated applications for the residue. More than two years having elapsed from the day stipulated for payment, the son gave the plaintiff a bill of exchange, which was dishonoured, and shortly afterwards became bankrupt. The plaintiff did not give the defendant notice of the dishonour of the bill, nor did he inform him of the state of the account until after the bankruptcy:—*Held*, that the defendant was, notwithstanding, liable.

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Then followed the guarantie on which the present action was brought, *viz.*—

“In the event of my son, *Thomas Edmonds*, jun., not paying *Charles Goring*, Esq., I hold myself liable, and hereby engage to fulfil the said payments according to the above conditions.

“*Thomas Edmonds.*

“*April 20, 1825.*”

It appeared, that shortly after this agreement was entered into, all the timber was removed by the defendant's son, without any further security being required by the plaintiff; and that he did not call on the son for payment until *December* the 19th, 1825, when he gave the plaintiff two bills of exchange for 200*l.* each, drawn by him upon and accepted by one *Alexander*, and which were paid into the plaintiff's bankers, and duly honoured when at maturity, *viz.* on the 14th and 28th *March*, 1826; that 424*l.* then remained due to the plaintiff in respect of the timber; that repeated applications were afterwards made to the defendant's son for payment; and that, on the 1st *October*, 1827, he gave the plaintiff a bill of exchange for 200*l.*, at two months' date, drawn by the son upon one *Williams*, which was dishonoured when it became due; and, that the plaintiff retained it, and did not give notice of its dishonour to the drawer. That, shortly after the bill became due, *viz.* on the 4th *December*, 1827, the defendant's son became bankrupt, and on the 27th of that month, the plaintiff's attorney for the first time made an application to the defendant upon his guarantie for the payment of 424*l.*, the sum remaining due for the timber; that the defendant at first expressed his surprise, as he had received no communication from the plaintiff on the subject since the guarantie was given, and said, that he did not recollect the terms of it; but, on the plaintiff's attorney producing the above agreement and undertaking, he ad-

mitted that he was liable, but the attorney did not inform him that his son had given the plaintiff the bills accepted by *Alexander* and *Williams*, or that the latter had been dishonoured and remained in the hands of the plaintiff.

For the defendant, it was insisted, that he was discharged from his liability as surety, the plaintiff having taken bills of exchange from the son, and not having communicated to the defendant that the timber had not been paid for, and in not having called on the defendant on his guarantie for more than two years and a half after the agreement was entered into.

His Lordship left it to the Jury to say, whether, under the circumstances, time had been given by the plaintiff to the original debtor (the defendant's son), without the consent of the defendant; and that it was a material fact for them to consider, that the defendant had admitted his liability on the guarantie at the time it was shewn to him by the plaintiff's attorney.

The Jury found a verdict for the plaintiff, damages 424*l.*, being the balance due from the defendant's son for the timber.

Mr. Serjeant *Russell* now applied for a rule *nisi*, that this verdict might be set aside and a new trial granted, or that the damages might be reduced from 424*l.* to 224*l.*, on the ground of a misdirection by his Lordship to the Jury.

First—Admitting that the mere laches or neglect of the plaintiff to call on his principal debtor would not discharge the defendant as his surety; yet, if from the nature of the dealings between the creditor and such debtor, the surety may be prejudiced, he is thereby discharged. So, if a creditor give time to the principal debtor, without the knowledge of the surety, or otherwise varies the nature of the security, the surety is discharged (a). Al-

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(a) Fell on Guaranties, 2nd edit. 160.

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though it may be assumed from the case of *Peel v. Tatlock* (a), where it was held, that delay in calling upon a party who guarantees the solvency, or to be answerable for the debt of another, does not exonerate the former, unless it can be shewn or presumed that he is a loser thereby; yet here, more than two years and a half had elapsed from the time the guarantie was given, before any application was made to the defendant to comply with it; and, during the time the principal was in solvent circumstances, the surety was never called upon; and after the son had become bankrupt, the defendant was deprived of any remedy he might have had against him for reimbursement. In *Rees v. Berrington*, Lord Eldon said, (b) "it is the clearest and most evident equity, not to carry on any transaction without the privity of him who must necessarily have a concern in every transaction with the principal debtor. You cannot keep him bound, and transact his affairs (for they are as much his as your own), without consulting him. You must let him judge, whether he will give that indulgence contrary to the nature of his engagement." In *Payne v. Ives* (c), the defendants gave the plaintiffs the following guarantie, dated the 19th April, 1821: "We undertake to indorse any bill or bills Mr. John Stubbs may give to Messrs. Payne & Co. (the plaintiffs), in part payment of an order for lace, which is now being executed for him; Messrs. Payne & Co. to allow 5*l.* per cent. on the amount of the said bills for the said guarantie." The goods were delivered to *Stubbs*, who paid the plaintiffs 500*l.* in money and wine, and in June following, accepted a bill drawn on him by the plaintiffs for the remainder, *viz.* for 337*l.*, at eighteen months' date. The plaintiffs retained the bill, without making any application to the defendants to indorse it, for seventeen months and ten days, and then, finding that *Stubbs* was insolvent, the plaintiffs applied for the

(a) 1 Bos. & Pul. 419.

(b) 2 Ves. 543.

(c) 3 Dow. & Ry. 664.

first time to the defendants for their indorsement: and it was held, that the plaintiffs were concluded by their laches, and that the defendants were not liable on their guarantie; and Lord Chief Justice *Abbott* said: "The general rule of law upon such subjects is clear, namely, that the demand must be made within a reasonable and convenient time. But, for the plaintiffs to forbear their demand for seventeen months out of eighteen, was neither reasonable nor convenient. Besides, the plaintiffs lie by until they learn that *Stubbs* has become insolvent, and until they discover that the indorsement is the only means by which they can secure their debt; and but for that discovery, they probably never would have applied at all. That, I think, they were not entitled to do under the agreement, and consequently that they ought not to have recovered in this action." So, here, the plaintiff lay by till the defendant's son became bankrupt; and by the terms of the agreement, whatever securities the son might give to the plaintiff, to induce him to consent to the timber being removed, were to be taken up and discharged, half at *Michaelmas*, 1825, and the other half at *Christmas* following at furthest, and the defendant merely engaged to fulfil the payments according to those conditions; and the bills inclosed were not given till the 19th of *December* in that year. This case falls within the principle established with regard to bills of exchange, *viz.* that a promise to pay by an indorser or other party to the bill, if made without knowledge of the laches of the holder, will not be binding, or make such indorser liable. *Blesard v. Hirst* (a). And in *Goodall v. Dolley* (b), it was held, that if the indorser of a bill not due, present it for acceptance, which is refused, and delay giving notice to his indorser, the latter will be discharged:—and that a subsequent proposal by him to pay the bill by instalments,

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(a) 5Burr. 2670.

(b) 1 Term Rep. 712.

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made without knowledge of the laches of the indorsee, is not a waiver of the want of notice:—Mr. Justice *Heath* being of opinion, at the trial, that as this proposal was made in ignorance of all the circumstances of the case, which it was material for the defendant to know, he was discharged by the laches of the plaintiff; and the Court afterwards sanctioned that opinion. So, here, the plaintiff should have informed the defendant of the transactions relative to the bills of exchange given by his son in payment for the timber, and the plaintiff by taking those bills discharged the defendant as surety. At all events, the plaintiff cannot be entitled to retain his verdict for the damages found by the Jury, as his taking the bill accepted by *Williams*, for 200*l.*, operated as a discharge *pro tanto*, particularly as the defendant had no knowledge of the dishonour, or that the bill had been given; and, if time be allowed to a principal, without the knowledge or consent of the surety, he is thereby discharged. The plaintiff, by retaining the bill, made it his own, and fraud alone would vitiate it; as the death, bankruptcy, or known insolvency of the drawer, constitute no excuse for neglecting to give due notice of its dishonour.

Lord Chief Justice TINDAL.—I am of opinion that this is not a case for a new trial. It has been suggested, that the Jury have been mis-directed on two points.

First, that mere laches by the creditor to enforce his demand against his debtor, will operate as a discharge to the surety. But, there is no case which goes to that extent, whilst there are several decisions to shew that laches alone, by the party whose debt is secured, will not discharge the surety or party guaranteeing its payment. There may, however, be an extreme case of negligence, which may almost amount to fraud, and fraud would be an answer to the demand as against the surety; but mere

negligence is not sufficient to exonerate him. In the case of the *Trent Navigation Company v. Harley* (a), the laches of obligees in a bond (conditioned for the principal obligor to account for and pay over from time to time all such tolls as he should collect for the obligees), in not properly examining his accounts for eight or nine years, and not calling upon the principal for payment so soon as they might have done, for sums in arrear and unaccounted for, was held not to be an estoppel at law in an action against the sureties. There, one of the grounds of defence taken at the trial was, that the sureties were discharged by their not having received notice of their principal being so much in arrear in his accounts, and by suffering him to run so much in arrear. But the learned Judge (Mr. Baron Wood), who tried the cause, ruled it to be no defence at law; and on the objection being again raised in *Banc*, on a motion for a new trial, Lord *Ellenborough* said (b): "The only question is, whether the laches of the obligees, in not calling upon the principal so soon as they might have done, if the accounts had been properly examined from time to time, be an estoppel at law against the sureties? I know of no such estoppel at law, whatever remedy there may be in equity." In *Payne v. Ives*, there was no actual liability cast on the sureties for a bye-gone debt, as the guarantie was founded on an executory promise by them to indorse any bills which their principal might give in part payment of an order for lace which was then being executed for him, and no application was made to the sureties to indorse the bill, until between seventeen and eighteen months after it was given, during the whole of which period the party to whom it was given kept it in his hands. In the case of an executory contract, that might so alter the state of things as to con-

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(a) 10 East, 34.

(b) Id. 40.

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clude the holder of the bill by his laches, but that ought not to govern the case of a guarantie for the payment of money, or where a party becomes surety for an existing debt.

Secondly, it has been said, that the mere giving of time by the plaintiff to the defendant's son as the principal, would have the effect of discharging the defendant as his surety; and, that the plaintiff having taken the bill on *Williams*, and retained it without giving notice of its dishonour to the drawer, he had made it his own, and discharged the defendant as surety. But, in *English v. Darley* (a), it was held, that merely giving time would not discharge the surety; for Lord *Eldon* said, "as long as the holder of a bill is passive, all his remedies remain, and if any of the parties be discharged by the act of law, as by an Insolvent Debtor's Act, that operation of law shall not prejudice the holder:" and here, the plaintiff never took any steps to enforce the payment of the bill. The question I left to the Jury was, whether, under the circumstances, time had been given to the defendant's son, without the consent of the defendant. He admitted his liability to the plaintiff's attorney, when the agreement was shewn him, and I thought there was no valid defence to the action; and that the mere circumstance of the plaintiff's not having made any communication to the defendant as to the state of the account between him and his son, would not operate to discharge the defendant as his surety. With respect to the reduction of damages, the bill for 200*l.* drawn by the defendant's son on *Williams* did not appear to be a real or *bond fide* transaction, as the acceptor was not a man of substance, nor was it shewn that he was indebted to the drawer at the time. I therefore think, that, under all the circumstances, the Jury arrived at a right

(a) 2 Bos. & Pul. 61.

conclusion, and that there is no reason to disturb their verdict.

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Mr. Justice PARK.—It is only necessary for me to say, that I perfectly concur with my Lord Chief Justice. With respect to the objection that the defendant is discharged by the laches of the plaintiff, the case of *The London Assurance Company v. Buckle* (a), appears to me to be far stronger than the present. There, a bond for 2000*l.* was executed by an insurance broker, as the principal obligor, and two sureties, conditioned that if they should pay the obligees certain premiums, which should become due for assurances on ships at sea, as should be made with the obligees by the insurance broker, and that, within six months after the making the insurances, the bond was to be void: the broker became bankrupt, and was indebted to the obligees in a large sum for premiums, which were due three years before the bankruptcy, and yet the obligees did not call on the sureties until after the bankruptcy;—it was held, that they were not discharged by the laches of the obligees in suffering the credit of the broker to run on so long beyond the six months stipulated by the bond; and Lord Chief Justice *Dallas* there said (b), “this appears to me to be the common case of a party becoming surety for another; and yet, it has been said, that, as the principal has not been called on, (although time was given him to pay the premiums), at the expiration of six months, the sureties are discharged. But no case has ever decided this position, nor will any principle of the common law carry it to so great a length.” Although it appears that I was not in Court at the time, yet I fully concur with the doctrine there laid down; and here, as my Lord Chief Justice left it to the Jury to say, whether time had been

(a) 4 B. Moore, 153.

(b) *Id.* 160.



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given to the principal without the consent of the surety, and he admitted his liability on his guarantie, I think this verdict ought not to be disturbed.

Mr. Justice BURROUGH.—I think that the direction of my Lord Chief Justice to the Jury was perfectly right; and that there is no reason to be dissatisfied with their verdict.

Mr. Justice GASELEE.—A surety ought to know the nature of the engagement he has entered into, and it is his fault if he neglect to inquire into the nature of the transactions between his principal and the party to whom he is indebted after the guarantie was given. In *Orme v. Young (a)*, Lord Chief Justice Gibbs held, that the neglect of the obligee of a bond to give notice to the surety that the principal had made default, did not discharge the surety; and in *Peel v. Tatlock*, where *A.* became bound to *B.* for the honesty of *C.*, who embezzled money, it was held, that *B.* might maintain an action on the guarantie, although three years had elapsed without any notice having been given of the embezzlement of *C.*, by *B.* to *A.* These appear to me to be authorities expressly in point; and I therefore agree with the Court, in thinking that there is no ground to disturb this verdict.

Rule refused.

(a) Holt's Ni. Pri. Cas. 84.

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Tuesday,
June 23rd.LAMBERT, *Ex parte*.

MR. Serjeant *Storks* moved, that the applicant might be admitted one of the attornies of this Court, although the notice of his intention to apply for admission had not been left or fixed up at the Chambers of the Lord Chief Justice, as required by the rule of this Court (a). The learned Serjeant founded his motion on an affidavit of the applicant, which stated that a notice containing his name and place of abode, &c., had been affixed on the outside of this Court, and also in the *Common Pleas* office, and that such notices had remained so affixed during the whole of the last Term; that a like notice had been fixed up in each of the Judges' Chambers of the Court, with the exception of the Lord Chief Justice; and that, through inadvertence, the notice intended to have been fixed up in his Chambers, had been left at the Chambers of Mr. Justice *Bayley*. That it was left there by mistake, and not with any intention of fraud, or with a view to evade any rule of this honourable Court.

A notice of application to be admitted one of the attornies of this Court, having been by mistake left at the Chambers of one of the Judges of the Court of *King's Bench*, instead of the Lord Chief Justice, the Court allowed the applicant to be admitted, on an affidavit declaring the fact.

The Court considering the affidavit to be sufficiently explanatory—

Granted the application.

(a) Trin. Term, 31 Geo. 3.

SNELL *v.* ANDERTON.

Thursday,
June 25th.

THE defendant was arrested and held to bail on the following affidavit of debt:

“ *Thomas Snell*, of &c., maketh oath and saith, that

sum, for goods sold and delivered to the defendant, and at his request, is insufficient, as it is necessary to allege that the goods were sold and delivered by the plaintiff to the defendant.

An affidavit of debt, stating that the defendant was indebted to the plaintiff in a certain

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Peter Anderton is justly and truly indebted unto this deponent, in the sum of 50*l.*, for goods sold and delivered to the said *Peter Anderton*, and at his request."

Mr. Serjeant *E. Lawes*, on a former day in this Term, obtained a rule *nisi*, that the defendant might be discharged out of the custody of the Sheriff of *Middlesex*, upon entering a common appearance, on the ground that the affidavit was defective in not stating that the goods were sold and delivered *by the plaintiff* to the defendant. The learned Serjeant relied on the case of *Fenton v. Ellis* (a), where the Court held, that an affidavit, stating the debt to be for goods sold and appraised to the defendant, without saying *by the plaintiff*, was insufficient, and they would not allow the affidavit to be amended.

Mr. Serjeant *Merewether* now shewed cause, and relied on the case of *Hulton v. Eyre* (b), where, in an affidavit for money paid to the use of the defendant, it was held unnecessary to state that it was at the request of the defendant. In *Symons v. Andrews* (c), an affidavit stating that the defendant was indebted to the plaintiff for money paid, and wages due to the plaintiff, for his services on board the defendant's ship, was deemed sufficient, without expressly stating that the debt was due from the defendant. In *Coppinger v. Beaton* (d), it was decided to be sufficient to state that the defendant was indebted to the plaintiff in a certain sum, for money had and received on account of the plaintiff, without adding, *received by the defendant*. In *Tidd's Practice* (e), it is said, that an affidavit made by a married woman, that the defendant was indebted for the rent of lodgings, and for money lent *by her* to the defendant, was held to be sufficient, although it did

(a) 1 Marsh. 535; S. C. 6 751; S. C. *nomine Eyre v. Hulton*, Taunt. 192. 5 Taunt. 704.

(b) 1 Marsh. 315.

(d) 8 Term Rep. 338.

(c) 1 Marsh. 317; S. C. 5 Taunt.

(e) 9th Edit. 184.

not state to whom the lodgings were let, and the person making the affidavit was herself incapable of lending money, for that she might have lent it as agent to her husband (*a*). Here, the plaintiff has sworn positively that the defendant is indebted to him, and the affidavit is sufficiently certain to support an indictment for perjury if the goods were not delivered to the defendant on account of the plaintiff. Although a debt must be sworn to positively, in order to hold a party to bail, yet the person making the affidavit is not to be involved in nice subtleties; and, although in *Fenton v. Ellis*, it was held necessary to state that the goods were sold *by the plaintiff*, yet the case of *Coppinger v. Beatson* was not adverted to, where the Court of *King's Bench* said, that no precise form of words was required to be used in an affidavit to hold to bail; that it was sufficient to allege that the defendant is indebted to the plaintiff in a certain sum of money, specifying the cause of action; and that the Court sought not to entangle the suitors in unnecessary niceties.

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Mr. Serjeant *E. Lawes*, in support of the rule, was stopped by the Court.

Lord Chief Justice TINDAL.—The case of *Fenton v. Ellis*, which was decided in this Court, is precisely in point, in which it was determined, that an affidavit stating that the defendant was indebted to the plaintiff in a certain sum for goods sold and appraised to the defendant, without stating *by the plaintiff*, was insufficient. With such a decision uncontradicted and unimpugned, it is useless to go into further reasoning on the subject.

The rest of the Court concurring—

Rule absolute (*b*).

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| (a) T. T. 40 Geo. 3, K. B. | 315; <i>Bulbi v. Batley</i> , 6 Taunt. 25; |
| (b) See <i>Perks v. Severn</i> , 7 East, | <i>Brown v. Garnier</i> , 6 Taunt. 389; |
| 194; <i>Cathrow v. Hagger</i> , 8 East, | S. C. 2 Marsh. 83. |
| 106; <i>Taylor v. Forbes</i> , 11 East, | |

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Friday,
June 26th.

Where the defendant became bankrupt after action brought, the Court enlarged the time for him to surrender in discharge of his bail, until a fortnight after he had finished his last examination.

STEAD *v.* YATES.

A RULE was, on a former day in this Term, obtained by Mr. Serjeant *Jones*, calling on the plaintiff to shew cause why the time for the defendant to surrender himself in discharge of his bail should not be enlarged until one month next after his last examination under a commission of bankrupt, which had been issued against him, and which examination was fixed for the 28th instant.

Mr. Serjeant *Cross* now shewed cause, and submitted that the defendant could not be entitled to have the time for his surrender enlarged as prayed; that the commissioners might adjourn from time to time; and that, under the statute 6 *Geo.* 4, c. 16, they might postpone the final examination for three months; and that during that interval the bail might become bankrupts.

Mr. Serjeant *Jones*, in support of his rule, after stating that the proceedings under the commission were instituted and carrying on in *Yorkshire*—

The Court said, that they considered a month to be unreasonable, and referred to the case of *Crump v. Taylor* (a), where the Court of *Exchequer* enlarged the time for the surrender of a bankrupt, charged in execution in discharge of his bail, to a fortnight after his last examination. In *Glendining v. Robinson* (b), the application was, that the bail might have a week's time to render the defendant, who had become bankrupt, from the day of his last examination. And in *Narres v. Glossop* (c), the Court required an affidavit, stating that the

(a) 1 Price, 74.

(b) 1 Taunt. 320.

(c) 2 Chit. Rcp. 101.

application was made by the bail; and in *Shaw v. Cash* (a), the Court refused to enlarge the time for the bail to render their principal who had become bankrupt, as the affidavit on which the application was founded did not state where the commission was sued out, or the residence of the commissioners.

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On the learned Serjeant's consenting that the defendant should render himself within a fortnight after his final examination—

Rule absolute.

(a) 4 Bing. 80.

HALL and Another v. CECIL RIX and JOHN RIX.

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June 26th.

THIS was an action of *assumpsit* by the plaintiffs as school-mistresses, for work and labour in teaching and instructing two of the defendants' sisters.

If a party on being called as a witness in an action of *assumpsit*, admit himself to be a co-contractor with one of the defendants, his testimony is not admissible, to prove the terms on which the contract was made, as such witness is liable to contribute to the costs of the action, and consequently has an immediate interest in the event of the suit.

At the trial, before Mr. Justice Park, at Westminster, at the Sittings after the last Term, the plaintiffs called a writing master, who attended their school, and who stated, that in December, 1826, the defendant, Cecil Rix, had a conversation with him respecting the plaintiffs' establishment, and said that he, in conjunction with his brother George, wished to place their sisters there. That the witness procured a *prospectus*, or terms of the school, which he shewed the defendant Cecil Rix, whom he afterwards met at the plaintiffs' house, and that the defendants' sisters were sent to the school in February, 1827. It also appeared that the defendant, John Rix, and his brother George, carried on the business of coal merchants, and that the defendant Cecil was clerk to a coal merchant. The plaintiffs delivered their school-bill, making Cecil and George Rix their debtors. But on the pro-

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duction of the bill, it appeared that the word *Cecil*, at the head of it, had been struck out, and *John* inserted in its stead.

The defendants called their brother *George* as a witness, and on his stating that he and his brother *John*, who had gone to *America*, had undertaken to educate their sisters, independently of *Cecil*, who had no funds to do so, the learned Judge rejected his testimony, on the ground that he had admitted himself to be a co-contractor, and consequently, that he had an interest in the event of the suit.

The Jury found a verdict for the plaintiffs, for 41*l.*, being the amount of the school bill, after deducting for some coals which had been furnished by the defendant *John Rix*, and his brother *George*, to the plaintiffs.

Mr. Serjeant *Andrews*, in the last Term, obtained a rule *nisi*, that this verdict might be set aside, and a new trial granted, on the ground, that the testimony of *George Rix* had been improperly rejected, as the admission made by him, that he was to pay for the education of his sisters conjointly with his brother *John*, was adverse to the witness's own interest. The learned Serjeant produced affidavits to shew that the substitution of the word *John* for *Cecil*, at the head of the school bill, was in the handwriting of one of the plaintiffs.

Mr. Serjeant *Wilde* now shewed cause.—The witness was properly rejected, for when he stated that he was jointly liable with his brother *John*, for the education of their sisters, although it might ultimately be against his interest, yet, the moment he admitted that he was a co-contractor, he made himself liable to contribution for the debt and costs, and he therefore had an immediate interest in the result of the suit; and if he were bound to contri-

bute in case the plaintiffs obtained a verdict against the defendants, he had an interest either in defeating the action altogether, or lessening the damages; and the fact he was called upon to prove was, that he and his brother *John* only were liable, but the latter having left the country, the defendant *Cecil* was the only responsible person, and to whom alone the plaintiffs looked for the payment of their bill. In *Jones v. Brooke (a)*, in an action by an indorsee against the acceptor of a bill of exchange, which had been accepted for the accommodation of the drawer, it was held that the latter was not a competent witness for the defendant, to prove that the holder took the bill for an usurious consideration; on the ground, that the witness was interested to defeat the action, for that, if the holder should succeed against the acceptor, the latter would not only have a right of action against the drawer for the principal sum, but also for all damages, which, as acceptor, he might sustain in being sued upon the bill:—the drawer of an accommodation bill being bound to indemnify the acceptor against the consequences of his acceptance for the drawer's accommodation. But the liability to the costs of an action, is a substantial objection to the competency of a witness; and, however indifferent he may be in other respects towards either party, yet, if he has incurred such a liability, he has an immediate and direct interest in the event of the suit. That principle was established in *Goodacre v. Breame (b)*, where, in an action of *assumpsit* for goods sold and delivered, the plaintiff having proved the sale of the goods to the defendant, and to one *J. S.*, who were partners in trade, Lord *Kenyon* held, that *J. S.* could not be a witness for the defendant, to prove that the goods were sold to himself, and that the defendant was not concerned in the purchase, except as the servant of *J. S.*, for, said his Lordship, “by discharging the defend-

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(a) 4 Taunt. 464.

(b) Peake's N. P. Cas. 175.—3rd edit. 232.

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ant, he benefits himself, as he will be liable to pay a share of the costs to be recovered by the plaintiff. In *Simons v. Smith* (a), which was an action for the non-performance of a contract against one of several partners, Lord Chief Justice *Abbott* said: that one partner could not release another, for the purpose of making him a competent witness in a particular action. So, in *Cheyne v. Koops* (b), in an action for a debt due by several partners, one of them who had not been joined in the action, was held not to be a competent witness for the defendant, by any release from him, for Lord *Alvanley* said: "the partners were all bound in equity to contribute, and the witness would of course be subjected to his share." So, here, when the witness *George Rix* admitted that he was a co-contractor with one of the defendants, he was liable to the costs of the action, and his testimony was properly excluded.

Mr. Serjeant *Andrews*, in support of his rule.—Although it has been said that the witness, *George Rix*, must be considered as a co-contractor, as he stated that he was to pay for the education of his sisters conjointly with his brother *John*, yet, the defendant *Cecil* is not liable in this action, as he was merely a clerk to a coal merchant; and it must be inferred, that the school-bill was to be paid by *John* and *George*, as they carried on trade in partnership as coal merchants, and had delivered coals to the plaintiffs by way of set off, for the tuition of their sisters; and as the name of *Cecil* was substituted for *John* at the head of the school-bill by one of the plaintiffs, the Jury might properly have inferred, that the credit was given to *John* and *George*, independently of the testimony of the latter.

Lord Chief Justice TINDAL.—I am of opinion that the witness, *George Rix*, was properly rejected. A Judge at

(a) 1 Ryan. & Mood. 29.

(b) 4 Esp. Rep. 112.

Nisi Prius can only determine whether the testimony of a witness be admissible or not, when he ascertains the fact such witness is called upon to prove; and when *George Rix* said, that he was liable in conjunction with his brother *John*, who was one of the defendants, for the education of their sisters, he admitted that he was a co-contractor, and as such, it is quite clear that he would be liable to contribute to the defendants towards the costs of this action; and it is an established principle, deducible from the cases to which we have been referred, that persons liable to the costs of the action have an immediate interest in the event, and therefore are not competent witnesses.

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Mr. Justice PARK.—I was most anxious to have this case re-considered, and I entertain the same opinion I formed at the trial, *viz.* that the defendant's brother, *George Rix*, was not admissible as a witness, as he himself admitted that he was a co-contractor, and as such he is liable to contribution for the costs. By the testimony of the writing master, the defendant *Cecil Rix* said, that he wished to place his sisters in some school, and that he went to the plaintiff's house, where his sisters were afterwards sent.

Mr. Justice GASELEE.—The cases to which we have been referred, are an express authority to shew, that a liability to contribute to the costs of the action is a substantial objection to the competency of a witness; and here, the witness expressly stated, that he was a co-contractor with one of the defendants, in consequence of which such liability attached. This rule, therefore, must be—

Discharged.

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June 27th.

Charles the first, by letters patent, granted to the mayor and burgesses of Lyme and their successors, the borough, pier, and quay of Lyme, with all the liberties and immunities to the same belonging; and directed that the mayor and burgesses, and their successors, should at their own costs repair the pier and quay, and all banks, &c., within the borough:—Held, that an individual who had sustained an injury from the banks being out of repair, might maintain an action on the case against the corporation, for the recovery of damages in consequence of such non-repair.

HENLEY v. The Mayor and Burgesses of LYME REGIS.

THIS was an action on the case, in which the plaintiff charged the defendants with negligence in the repair of sea walls.

The first count of the declaration stated, that on the 20th of June, in the tenth year of the reign of *Charles the first*, to wit, at the parish of *Lyme Regis*, in the county of *Dorset*, our said late sovereign, by his certain letters patent, duly sealed in that behalf, after reciting as therein was recited, did for himself, his heirs and successors (amongst other things), *give, grant, and confirm to the mayor and burgesses of Lyme Regis, and their successors, the borough or town of Lyme Regis; and also all that the building called the pier, quay, or cob of Lyme Regis; with all and singular the liberties, privileges, profits, franchises, and immunities to the same town, or to the said pier, quay, or cob, in any-wise howsoever belonging or appertaining:—to have, hold, and enjoy the aforesaid borough or town; and also, all that the building aforesaid, called the pier, quay, or cob of Lyme Regis, with all and singular the liberties, franchises, privileges, and immunities, to the aforesaid mayor and burgesses of the borough aforesaid, and their successors, to the only and proper use and behalf of them the same mayor and burgesses of the borough aforesaid, and their successors, in fee farm for ever; yielding of fee farm to our said late King Charles the first, his heirs and successors, of and for the aforesaid borough or town, with its liberties and franchises, as in the said letters patent in that behalf mentioned; and our said late sovereign King Charles the first, did further, of his abundant special grace, and of his certain knowledge and mere motion, for himself, his heirs, and successors, pardon, remise, and release to the same mayor and burgesses of the borough or town aforesaid, and their successors for ever, twenty-seven*

marks, parcel of thirty-two marks of the farm of the said borough and the liberties thereof, anciently by letters patent, or in any other manner, due; and did direct that the aforesaid mayor and burgesses of the borough of *Lyme* aforesaid, and their successors, *all and singular the buildings, banks, sea-shores*, and all other mounds and ditches within the aforesaid borough of *Lyme*, or to the aforesaid borough in any-wise belonging, or appertaining, or situate between the same borough and the sea, and also the said *building there called the pier, quay, or the cob, at their own costs and expences, thenceforth*, from time to time for ever, should well and sufficiently repair, maintain, and support, as often as it should be necessary or expedient; and further, did grant to the aforesaid mayor and burgesses of the borough aforesaid, and their successors, that the mayor of the same borough for the time being, for ever thereafter, should be clerk of the market within the borough or town aforesaid, and the liberties and precincts of the same; and that the mayor of the borough aforesaid, for the time being, should do and execute, and might and should be able to do and execute there for ever, all and whatsoever to the office of clerk of the market of our said late King *Charles* the first's household there pertained to be done and performed; so, nevertheless, that the clerk of the market of our said late King *Charles* the first's household for the time being, together with the aforesaid mayor for the time being, might exercise the office above said, and intromit when he would to do any thing which pertained to the office of clerk of the market there, in the borough aforesaid, and the liberties and precincts of the same: and further, our said late King *Charles* the first, for himself, and his heirs and successors, did, by his said letters patent, give and grant to the said mayor and burgesses of the borough and town aforesaid, and their successors, all and singular the fines, amercia-

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ments, and sums of money before the said clerk of the market of the town or borough aforesaid, or the clerk of the market of the said late King *Charles* the first, or his deputy, by either or any of the inhabitants of the borough or town aforesaid, after the date and making of the said letters patent, forfeited, or thereafter to be forfeited and assessed in the same borough:—to have and enjoy to the same mayor and burgesses of the borough aforesaid, and their successors, to the use of the aforesaid mayor and burgesses, and their successors for ever, of the said late King *Charles* the first's gift, without account, or any other thing for the same to our said late King *Charles* the first, his heirs or successors, in any-wise howsoever to be rendered or paid, and to be levied by their own servants and ministers, without estreats thereof, to be sent to the *Exchequer* of our said late King *Charles* the first. And, moreover, of his more ample special grace, and of his certain knowledge and mere motion, our said late King *Charles* the first, did will, and, by letters patent, did for himself, his heirs and successors, give and grant to the said mayor and burgesses of the borough aforesaid, and their successors, full power, authority, and licence, from time to time for ever, to dig stones and rocks in any places whatsoever within the borough and parish of the town aforesaid, out of the sea and on the sea shore, in the borough and parish aforesaid, adjoining to the said borough or town, for the reparation and amendment of the port and building aforesaid, called the pier, quay, or cob, and other necessary reparations and common works of the same town and borough, and belonging and appertaining to the building aforesaid; and, our said late King *Charles* the first did also, by his said letters patent, will and grant to the aforesaid mayor and burgesses of the borough aforesaid, and their successors, that the same mayor and burgesses and their successors, should have, hold, use, and enjoy,

and might and should be able, fully, freely, and entirely to have, hold, use, and enjoy for ever, all the liberties, free customs, privileges, authorities, acquittances, and licences aforesaid, according to the tenor and effect of the said letters patent, without the let or impediment of the said late King *Charles* the first, his heirs or successors whomsoever, our said late King *Charles* the first willing not that the same mayor and burgesses and inhabitants of the borough or town aforesaid, or either or any of them, by reason of the premises, or either or any of them, should be thereof hindered, molested, aggrieved, or vexed, or in any thing disturbed by him the said late King *Charles* the first, or by his heirs, or his or their justices, sheriffs, escheators, or other the bailiffs or ministers of the said late King *Charles* the first, his heirs or successors whomsoever; which said letters patent, the mayor and burgesses of the borough aforesaid, afterwards, to wit, on the same day aforesaid, to wit, at *Lyme Regis* aforesaid, in the county aforesaid, duly accepted, and the same thence hitherto have been and still are one of the governing charters of the said borough, to wit, at *Lyme Regis* aforesaid. And the plaintiff further said, that the said mayor and burgesses, from the time of their acceptance of the said letters patent, hitherto, have had, held, received, and enjoyed, all the benefits, profits, and advantages granted to them by such letters patent as aforesaid, to wit, at *Lyme Regis* aforesaid, in the county aforesaid. That, before and at the time of the committing of the grievances by the defendants as thereafter next mentioned, the plaintiff was lawfully possessed of and in divers, to wit, five messuages, five cottages, five buildings, and divers, to wit, twenty closes of land, with the appurtenances, situate and being in the county aforesaid, to wit, in the borough of *Lyme Regis* aforesaid. That, before and at the time of the committing of the grievances by the defendants as thereafter next mentioned, divers, to wit, five other messuages, five

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other cottages, five other buildings, and divers, to wit, twenty closes of other land, with the appurtenances, situate and being in the county aforesaid, to wit, in the borough of *Lyme Regis* aforesaid, were in the possession and occupation of divers persons as tenants thereof respectively to the plaintiff, the reversion thereof then and still belonging to the plaintiff, to wit, at the borough of *Lyme Regis* aforesaid, in the county aforesaid, all which said several messuages, cottages, buildings, and closes of land, with the appurtenances, before and at the times of the committing of the several grievances by the defendants as thereafter next mentioned, were abutting on or near the sea-shore there, to wit, at the borough aforesaid, in the county aforesaid. That, before and at the time of the sealing of the said letters patent, and the acceptance thereof as aforesaid, by the said mayor and burgesses; and also, at the time of the committing of the several grievances by the defendants as thereafter next mentioned, divers, to wit, ten buildings, ten banks, ten sea-shores, and ten mounds, had been, and were then respectively standing and being within the borough of *Lyme Regis* aforesaid; and divers, to wit, ten other buildings, ten other banks, ten other sea-shores, and ten other mounds, had been, and respectively were belonging and appertaining to the said borough; and divers, to wit, ten other buildings, ten other banks, ten other sea-shores, and ten other mounds had been, and were at those times respectively standing and being and situate between the said borough and the sea, to wit, in the borough aforesaid, in the county aforesaid; all which said buildings, banks, and sea-shores, and mounds respectively, at the times of the committing of the several grievances by the defendants as thereafter next mentioned, were near to, and then and there constituted and formed, and were a protection and safeguard, and still of right ought to form and be a protection and safeguard to the said several messuages, cottages, buildings, and closes of land of the plaintiff, with the ap-

purtenances aforesaid, and then and there have hindered and prevented, and still of right ought to hinder and prevent, the sea, and the waves and waters thereof, from running or flowing on, upon, against, or over the said several messuages, cottages, buildings, and closes of land last aforesaid; and all which buildings, banks, sea-shores, and mounds, the defendants, at the times of the committing of the several grievances by them as thereafter next mentioned, were, under and by virtue and in pursuance of the aforesaid letters patent, and the acceptance thereof as aforesaid, liable to, and ought at their own proper costs and charges, well and sufficiently to have repaired, maintained, and supported, and still are liable to, and ought, at their own proper costs and charges, well and sufficiently to repair, maintain, and support, when and so often as it should or might have been, or shall or may be necessary or expedient so to do, so as to prevent damage or injury to the said messuages, cottages, buildings, and closes of the plaintiff, by the sea, or the waves or waters thereof, to wit, at the borough aforesaid, in the county aforesaid.— Yet, the defendants, well knowing the premises, and not regarding the said letters patent, or their duty in that behalf, but contriving, and wrongfully and unjustly intending, to injure, prejudice and aggrieve the plaintiff, and to deprive him of the use and benefit of his several messuages, cottages, buildings and closes first above-mentioned; and also, to injure, prejudice and aggrieve him the plaintiff, in his reversionary interest of and in the said messuages, cottages, buildings and closes secondly above-mentioned, so being in the possession and occupation of the said persons as tenants thereof to him the plaintiff as aforesaid, in which he the plaintiff was so interested as aforesaid, theretofore, to wit, on the 1st day of *January*, 1821, and from thence for a long space of time, to wit, continually until the commencement of this suit, to wit, at the borough aforesaid,

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in the county aforesaid, wrongfully and unjustly suffered and permitted the said buildings, banks, sea-shores, and mounds, to be and continue, and the same, during all the time aforesaid, were ruinous, prostrate, fallen down, washed down, out of repair, and in great decay, for want of due, needful, proper and necessary repairing, maintaining and supporting the same, to wit, at the borough aforesaid in the county aforesaid, by means of which said several premises, the sea, and the waves and waters thereof, afterwards, to wit, on the said 1st *January*, 1821, and on divers other days and times between that day and the commencement of this suit, to wit, at the borough aforesaid, in the county aforesaid, ran and flowed with great force and violence, in, upon, under, over, and against the said several messuages, cottages, buildings, and closes of the plaintiff, and in which he was so interested as aforesaid, and thereby then and there greatly inundated, damaged, injured, undermined, washed down, beat down, prostrated, levelled, and destroyed the said several messuages, cottages, and buildings, and the materials of the same messuages, cottages, and buildings, together with divers, to wit, ten thousand cart loads of the earth and soil, and divers, to wit, five acres of the said several closes, were washed and carried away, to wit, at the borough aforesaid, in the county aforesaid. By means of which said several premises, the plaintiff not only lost and was deprived of the use, benefit, and enjoyment of his said messuages, cottages, buildings, and closes in that count first above-mentioned, but was also thereby then and there greatly injured, prejudiced and aggrieved in his reversionary estate and interest of and in the said several messuages, cottages, buildings, and closes in that count secondly above-mentioned, so being in the possession and occupation of the said persons as tenants thereof to the plaintiff as aforesaid, and in which the plaintiff was so interested as aforesaid; and the plaintiff had been and was, by means of the premises afore-

said, otherwise greatly injured and damnified, to wit, at the borough aforesaid, in the county aforesaid.

The second count stated, that *Charles* the first, by his letters patent, after reciting as therein is recited, and after, among other things, giving and granting to the mayor and burgesses of the said borough certain privileges and advantages, *did direct* that the said mayor and burgesses, and their successors, should from time to time for ever, when it was necessary or expedient, repair, at their own costs, all the buildings, banks, sea-shores, and other mounds, to the borough belonging or appertaining, or situate between the borough and the sea; which said last-mentioned letters patent, the defendants afterwards, to wit, on the said 20th *June*, at the borough aforesaid, in the county aforesaid, duly accepted; that the plaintiff, before and at the time of the committing of the grievances by the defendants, as thereafter mentioned, was lawfully possessed of divers, to wit, five other messuages, five other cottages, five other buildings, and twenty other closes of lands, with the appurtenances; and that divers, to wit, five other messuages, five other cottages, five other buildings, and divers, to wit, twenty closes of other land, were in the possession and occupation of divers tenants to the plaintiff, the reversion thereof being in the plaintiff; all which messuages, cottages, &c. &c., were abutting on or near the sea-shore; as in the first count.

The plaintiff then averred, that before, and at the time of the sealing of the said letters patent, and the acceptance thereof by the said mayor and burgesses, divers, to wit, ten buildings, ten banks, &c. &c., had been and were respectively standing and being within, and belonging and appertaining to the said borough, and all which buildings, banks, &c. &c., constituted and formed, and were a protection and safeguard to the messuages, &c., of the plaintiff, and hindered and prevented, and

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still of right ought to hinder and prevent the sea, &c., from running or flowing on or over the said several messuages, &c., all which buildings, banks, &c., the defendants, at the time of the committing of the several grievances by them as thereafter next mentioned, were under and by virtue and in pursuance of the aforesaid letters patent, and the acceptance thereof as aforesaid, liable to, and ought at their own proper costs and charges, well and sufficiently to have repaired, maintained, and supported, and still are liable, and ought, at their own proper costs and charges, well and sufficiently to repair, when and so often as it should or might be necessary or expedient so to do. The second count concluded by assigning a breach by the defendants' suffering and permitting the buildings, banks, &c. to be ruinous and out of repair, as in the first count.

The third and fourth counts charged the defendants with a liability to repair the walls by prescription; and the fifth, *ratione tenuræ*. Plea—Not Guilty.

At the trial, before Mr. Justice *Littleale*, at the Spring Assizes, at *Dorchester*, 1828, after the evidence on behalf of the plaintiff had been closed, the learned Judge intimated an opinion, that he could not be entitled to recover on the three last counts; upon which it was agreed by the counsel upon both sides, that a verdict should be entered for the plaintiff on the first and second counts, which charged the defendants under the charter, and the Jury were discharged as to the other three.

Mr. Serjeant *Merewether*, in *Easter Term*, 1828, obtained a rule, calling on the plaintiff to shew cause why the judgment should not be arrested on the first and second counts, on the ground that the action could not be maintained—*First*, because the obligation of the defendants to repair the banks in question being imposed by the char-

ter or letters patent of King *Charles* the first, the Crown alone could take advantage of a breach of either of the conditions of such charter; and that, if the mayor and burgesses of *Lyme* failed to repair the pier, or cob, or banks, the letters patent might be repealed by *scire facias*, so as to revert the original right in the Crown. *Secondly*, that, as the plaintiff was a mere stranger to the instrument, he could not avail himself of a breach of the condition to repair, as he could claim no right under or by virtue of the charter. And *Lastly*, that although an individual might maintain an action against a public officer, for the neglect of a duty which such individual might call on the officer to perform of common right, and without any grant, yet, that where a person could never have obtained a given benefit, except as resulting to him incidentally from a contract between the Crown and its grantees, the loss of that benefit was not a sufficient injury for which he could claim redress in any species of action. There is a wide distinction between misfeasance and non-feasance, the one being the improper performance of some act which might lawfully be done, the other the omission of some act which the party is bound or ought to perform; and although in the case of *The Queen v. The Inhabitants of Stretford* (a), Lord Chief Justice *Holt* cited *Duncomb's* case (b), to shew that inclosing the land next adjoining to a highway, would draw upon the owner of the land the charge of repairing the highway; yet, here, the plaintiff could not compel the corporation to repair the banks in question, as they held the land by grant or charter from the King, to which the plaintiff was no party. It was incumbent on the plaintiff to shew a special reason why the corporation ought to repair, as they are not bound to do so of common right; *Tenant v. Goldwin* (c); and in the *Mayor of Lynn v. Turner* (in

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LYME REGIS.(a) 2 *Ld. Raym.* 1169.(b) *Cro. Car.* 366.(c) 2 *Ld. Raym.* 1089; *S. C.* 1
Salk. 360.

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error) (a), the plaintiff alleged, that the corporation had from time immemorial been used to repair a certain creek. They were, therefore, bound by prescription, which might be the condition on which they received their charter. At all events, the defendants cannot be deemed liable to repair, unless they have funds for that purpose, which the plaintiff has neither alleged nor proved; and the banks in question cannot be considered as adjoining to or protecting a highway, nor can the plaintiff have any just cause of complaint, as he has no interest whatever in the charter, by virtue of which alone the property is vested in the defendants.

Mr. Serjeant *Wilde*, in *Trinity Term*, 1828, shewed cause.—The main ground of objection is, that the plaintiff, as an individual, has no remedy against the defendants for the non-performance of a supposed or alleged duty cast upon them by the charter, as he is a perfect stranger to the deed, and therefore can claim no right under it. But the defendants, by the acceptance of the grant from the Crown by the then mayor and burgesses of *Lyme*, upon condition of repairing and maintaining the sea-banks and the pier or cob; and also, as the owners and occupiers of the soil, as alleged in the first count of the declaration, are chargeable with the repair of such banks, *ratione tenuræ*; and if any individual sustain an injury by their neglecting to repair, he is entitled to maintain an action on the case against them for such non-repair, which clearly amounts to non-feasance. It must be assumed, that the grant is profitable to the corporation, and the defendants still continue in possession by virtue of the charter, and under which they are chargeable with the repairs. If an individual sustain a personal injury by the breach of a public obligation, for instance, for the non-repair of a highway, it is quite

(a) Cowp. 86.

clear that he is entitled to a compensation for such injury. In the case of *The King v. Kerrison* (a), an indictment charging an individual with the repair of a bridge, by reason of his being owner and proprietor of a certain navigation, was held not to be equivalent to charging him *ratione tenuræ*; and on its being said in the course of the argument, that, according to *Hawkins* (b), and *The King v. Spiller* (c), the words *ratione tenuræ* are equivalent to charging the individual in a *que* estate—it is a concise form, importing that he holds the land on the service of repairing, and that the land was originally granted to him on that condition; Lord *Ellenborough* asked, if ownership was not also a compendious expression, comprising the entire interest in the soil, as well as the tenure upon which it is holden? In *The King v. Kerrison* (d), where certain persons and their successors were authorized by act of Parliament to make a river navigable, by virtue of which they cut through a highway, and rendered it impassable, and a bridge was built over the cut, over which the public passed, and which had been repaired by the proprietors of the navigation; it was held that they, and not the county, were liable to repair, for that it could not be intended that the statute meant to vary the rights of the community, and impose upon them a burthen to which they were not before liable, for that equity requires that he who reaps the profit should bare the burthen; and here, from the facts alleged in the declaration, it is evident that the defendants were bound to repair *ratione tenuræ*, *viz.* either by virtue of the charter, or by the ownership or occupation of the soil. Public rights and interests must be protected and upheld to the fullest possible extent. Although in *Russell v. The Men of Devon* (e), it was held, that an action on the

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(a) 1 Mau. & Selw. 435.

(d) 3 Mau. & Selw. 526.

(b) Pl. Cr. Book 1, c. 76, s. 8.

(e) 2 Term Rep. 667.

(c) Styles, 109.

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case would not lie by an individual against the inhabitants of a county, for an injury sustained by the former in consequence of a county bridge being out of repair, yet that case was decided on the ground that the defendants were not a corporation; for Lord *Kenyon* said—"The question is, whether this body of men, who are sued in the present action, are a corporation, or *qua* a corporation, against whom such an action can be maintained." And Mr. Justice *Ashhurst* said—"That if the action could be sustained, the public would suffer a great inconvenience, for that if damages are recoverable against the county at all events, they must be levied on one or two individuals who have no means whatever of reimbursing themselves; for if they were to bring separate actions against each individual of the county for his proportion, it is better that the plaintiff should be without remedy." That, however, cannot apply to this case, as the defendants are part of a corporate body, duly constituted by letters patent, and by virtue of which they were bound to repair. In *Popham v. The Prior of Breamore* (a), *Hanke, J.*, and *Thirne, J.*, said: "If he who ought to scour a ditch does not scour it, *per quod* my land is surrounded, an action upon the case lies." In *Steinson v. Heath* (b), in an action on the case for toll traverse, it was objected that the action was only for a non-feasance, *viz.* not paying, for which an action on the case does not lie, but debt, if any toll be due:—to which it was answered, that the action lies without shewing the title or the consideration in the declaration, and several authorities were there referred to, to shew that case lies for non-feasance; and, among others, for not repairing a bridge by which I am to pass. No distinction can be drawn between an individual and a corporation, as to the liability to repair. In *Yielding v. Fay* (c), it was held, that an action

(a) 11 Hen. 4, 83.

(b) 3 Lev. 400.

(c) Cro. Eliz. 569.

on the case lies against a parson for not keeping a bull for the increase of cattle within the parish. In *Rolle's Abridgment* (a), it is said, for negligence in non-feasance, an action upon the case lies, as, if he who ought to repair a bridge, does not repair it, *per quod* it falls, an action upon the case lies for this; and 11 *Hen.* 4, 83, is referred to as an authority in support of that doctrine. But it is said, that the plaintiff is a stranger to the grant from the Crown, and, therefore, that he cannot take advantage of it for a breach of any of the conditions therein contained. But a grant from the Crown is not like a grant from a subject; for the former must be construed largely, and with a view to the interests of the public whom the Crown represents. Reservations for the benefit of the public may be made in grants by individuals (b); and here, the grant was for a public purpose, in which all persons have an interest; and it must therefore not receive the same construction as a private grant or charter. In *Comyns's Digest* (c), it is said, that an action upon the case lies against him, who neglects to do that which by law he ought to do:—and a number of authorities are referred to in support of that position. Where, therefore, a party is liable to perform a public duty, if he neglect to do so, an injury sustained by an individual for a neglect of such duty, may be made the subject of an action upon the case. In *Callis on Sewers* (d), it is said, “A man may be bound by his covenant to repair a wall, bank, sewer, or other such like matter, and he may bind himself and his heirs to do the same; but yet this covenant will not bind his heirs after his death, unless there be left assets in fee simple to descend to the said heir from the said ancestor which made the covenant. But, if land be charged therewithal by tenure or other-

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(a) Vol. 1, 104, pl. 1, 2.

(c) Tit. Action upon the case

(b) 11 *Hen.* 7, fol. 12, pl. 3, for negligence, (A. 3).

(d) 1st Edit. 90.

12 *Hen.* 7, fol. 18.

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wise, as a charge imposed upon land by prescription, then the said lands are therewithal chargeable *in cujusunque manus devenerint*;—*quod nota*." Here, the King, as the grantor, made a reservation on behalf of the public, which is a good consideration for the grantees to repair, and they therefore took the property, subject to the charge or burthen of such repairs, and as their successors continue to enjoy it, they are liable to any individual who may sustain an injury from want of such repairs. In the case of *The Mayor of Lynn v. Turner* (a), which was an action on the case against a corporation, for not repairing and cleansing a creek into which the tide of the sea flowed and reflowed; as the declaration alleged that the corporation had from time immemorial been used to repair, Lord Mansfield said—"It states, therefore, that they are bound by prescription, and it might be the very condition and terms of their creation or charter." Here, however, the public at large may be considered as having an interest in the grant, as it is of a public nature; and in *Greasley v. Codling* (b), it was held, that if a party sustain an individual injury or inconvenience by the obstruction of a public way, he may maintain an action on the case against the person who caused the obstruction. In *Peter v. Kendall* (c), a neglect of duty on the part of the owner of a ferry, was held to be no answer to an action on the case for the disturbance of the ferry, although the Crown might, on that ground, repeal the grant by *scire facias* or *quo warranto*. Here, however, the Crown have not interfered, and a mere neglect by the defendants to repair the walls, will not deprive them of their claim to tolls. The corporation cannot be allowed to enjoy all the advantages arising from the grant, without being liable to the burthens it imposes upon them; and, although it

(a) Cowp. 86.

Bing. 263.

(b) 9 B. Moore, 489; S. C. 2

(c) 6 Barn. & Cress. 703.

may be said, that a *mandamus* might lie against them to compel them to repair, yet that would not afford the plaintiff redress for the injury he has individually sustained. In *Payne v. Rogers* (a), it was decided, that if the owner of a house be bound to repair it, he, and not the occupier, is liable to an action on the case, for an injury sustained by a stranger from the want of repair; and here the defendants were liable to repair the banks *ratione tenuræ*, as they were owners of the frontage: and, in *Callis on Sewers*, it is said (b), “that it seems that the frontagers are bound to the repairs.” In *Charley v. Winstanley and Wife* (c), in an action for a breach of covenant made by a wife, *dum sola*, in non-payment of money pursuant to an award which she had covenanted to abide by and perform;—the declaration alleged, that the arbitrator made his award *after the intermarriage of the defendants*, and it was moved, in arrest of judgment, that the award was void, the submission being revoked in law by the marriage, and therefore, that no action could be maintained for the breach of the award; but the Court held that the declaration (shewing a breach of the covenant by a revocation of the submission by the intermarriage between the submission and the award), was valid and sufficient to support the action, although it was a breach of covenant informally, and only impliedly, alleged. So, in *Perreau v. Bevan* (d), which was an action against the sheriff, for not taking due care of a replevin bond; it was held, that, assuming the plaintiff in the action had not proved the breach alleged in the declaration, yet, as it appeared that there had been a breach of the condition of the bond, by reason of the plaintiff in replevin not having prosecuted his suit with effect, the plaintiff was entitled to recover, although a breach in that respect was not formally

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(a) 2 H. Bl. 350.

(b) Page 88.

(c) 5 East, 266.

(d) 5 Barn. & Cress. 284; S. C.
8 Dow. & Ryl. 72.

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assigned; and here, it is quite clear that the breach is sufficient to charge the defendants with the non-repair of the walls, as well by virtue of the charter, as *ratione tenuræ*.

Mr. Serjeant *Taddy*, and Mr. Serjeant *Merewether*, in support of the rule.—The defendants are not charged as owners of the banks in either of the counts of the declaration; and there is nothing in the first or second counts to charge them *ratione tenuræ*. It does not even appear that the Crown were ever in possession of the banks or mounds, or that the defendants now held or occupied them; for, it is merely alleged, that divers buildings, banks, and mounds, were standing within and appertaining to the borough, and between the borough and the sea; and all that was granted by *Charles* the first to the mayor and burgesses, was the borough, and the building called the pier, quay, or cob; and the plaintiff did not prove that the banks or walls in question were within the borough, or between it and the sea; and unless he could satisfactorily shew that the defendants were bound to repair them, he could not sustain this action. There is nothing on the face of the record to shew that the defendants were liable to the discharge of a public duty, or that they would be subject to an indictment for suffering the banks to decay, or become ruinous. The charge as alleged arises within the time of legal memory, *viz.* by letters patent granted by *Charles* the first; and a corporation can only be made chargeable by prescription, or *ratione tenuræ*. It is not sufficient for the plaintiff to allege grounds which may exist, and which may be sufficient to support a prescriptive right; but he should have averred that the defendants were bound to repair from time immemorial. In the case of *The King v. The Inhabitants of Great Broughton*, Mr. Justice *Ashhurst* said (a)—“If you lay a

(a) 5 Burr. 2702.

charge upon persons against common right, you must then shew how they are bound. It is not enough to shew that they immemorially ought to repair: it should be shewn that they have repaired. So, in *The King v. The Inhabitants of Sheffield*, which was an indictment against the inhabitants of a township for not repairing roads within it, Mr. Justice *Ashurst*, in delivering the judgment of the Court said (a): "Where the indictment is against a township, or particular persons, it must allege, that, from time immemorial, they were bound to repair; which shews that the particular allegation is not necessary where they are bound by the general law." Here, the defendants were not bound to repair by the general law, nor *ratione tenuræ*, nor by prescription, as the plaintiff has not alleged that they were bound to repair from time immemorial; or, in fact, that they have ever repaired. In *The Mayor of Lynn v. Turner*, Lord *Mansfield* said—"It is alleged that the corporation have, from time immemorial, been used to repair; it states, therefore, that they are bound by prescription, and it might be the very condition and terms of their creation or charter." Although it is averred that the mayor and burgesses accepted the charter, it did not impose a duty on the defendants to repair. In *The King v. Kerrison*, it was held to be erroneous to charge an individual in an indictment with the repair of a bridge by reason of his being owner and proprietor of a navigation, as it was not equivalent to charging him *ratione tenuræ*; and Mr. Justice *Le Blanc* said (b): "It is admitted, that this would be the first instance of the Court's upholding an indictment framed as this is in other than the technical language of the law, by which an individual, who is charged with the reparation of a bridge, must be charged 'by reason of tenure;' or, if it be the case of a corporation, it may be done by general prescription." In *The King v.*

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(a) 2 Term Rep. 111.

(b) 1 Mau. & Selw. 441.

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The Mayor of *Stratford-upon-Avon* (a), the indictment stated, that the defendants (the mayor, aldermen, and burgesses), had *immemorially* been bound, and been used and accustomed, to repair a bridge; and it was held, from the preponderance of the evidence, coupled with a charter of *Edward* the Sixth, that they were bound by *prescription*, and not merely by *tenure*. Although it may be said, that the Crown made the grant to the mayor and burgesses of *Lyme*, on condition of certain services, yet there is no valid distinction between a grant from the Crown and a grant from an individual; and a stranger cannot avail himself of any reservations in such grant. Besides, the services reserved were not a public duty, and even if they formed the condition of the grant, the Crown might remit them, as it did the payment of the twenty-seven marks. But the Crown cannot remit a public duty, and the only ground on which a corporation can be called on to repair a bridge or walls of this description is, where they are chargeable by prescription, or *ratione tenuræ*. Lord *Coke* says (b): "Murage is a reasonable toll to be taken of every cart, &c., coming to a town, for the inclosing of that town with walls of defence for the safeguard of the people in time of war, insurrection, tumults, or uproars, and is due either by grant or by prescription. But if a wall be made which is not defensible, nor for the safeguard of the people, then ought not this toll to be paid, for the end of the grant or prescription is not performed." Here, the tolls or dues formed no part of the condition of the grant, and if the grantee neglect to render services reserved under the grant of a franchise, it is a loss of the franchise; and if the plaintiff in this case had any remedy against the defendants, it was by indictment, and not in this form of action. In *The King v. The Earl of Exeter* (c), it was held, that the lord of a franchise was not, as such, bound to repair a

(a) 14 East, 348. (b) 2nd Instit. 222, c. 31. (c) 6 Term Rep. 373.

gaol within it, although he might be subject to such a charge by immemorial usage, and the indictment stated that he had *immemorially* been used and accustomed, and of right ought to repair the gaol whenever it became decayed and ruinous. In *Rose v. Miles* (a), the defendant wrongfully moored a barge across a public navigable creek, which was not only a public nuisance, but the plaintiff was thereby impeded in his progress, and compelled to carry his goods over land, by which he incurred expense, through the act of the defendant. So, in *Greasly v. Codling*, the defendant had been guilty of mis-feasance, by fastening a gate across a public highway, by which the plaintiff was not only delayed in his journey, but obliged to take a more circuitous route. These, however, were cases of mis-feasance, and a breach of a public duty, whilst here, the defendants are merely charged with non-feasance, in suffering the walls to be out of repair. In *Star v. Rookesby* (b), it was decided, that where a charge is imposed on another, and that against common right, and the charge is laid on him as owner of the soil or terre-tenant, the plaintiff, in his declaration, must make himself a good title. There, however, the plaintiff declared that the tenants or occupiers had, *time out of mind*, made and repaired a fence, for the want of the repair of which the action was brought. The defendant, therefore, was bound to repair by prescription: but here, the first and second counts merely charge the defendants with a liability to repair by virtue of the grant or charter from the Crown. In *Keighley's case* (c), it was resolved, that if one who is bound by prescription to repair a wall *contra fluxum maris*, and he keeps the wall in good repair, and of such height, and as sufficient as it was accustomed, and by the sudden and unusual increase of water, salt or fresh, the walls are broken, or the water overflows the walls; in this case, the

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(a) 4 Mau. & Selw. 101. (b) 1 Salk. 336. (c) 10 Rep. 139.

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Commissioners of Sewers ought to tax all such persons who hold any lands or tenements, &c., or have or may have any loss, damage, or disadvantage, by any manner of means in the same places, according to the quantity of their lands, &c, for no fault in this case was in him who ought to repair it. Here, however, the allegation that the defendants are liable to repair the banks, is in general terms; and without any qualification, and they can only be liable to common repairs, and are not bound to make good devastations occasioned by floods or tempests, or any thing which may be attributable to the act of God. Besides, it is not alleged, that the plaintiff's houses were built or standing at the time of the grant, and the defendants cannot be compelled to protect modern buildings or erections; and there might have been, and probably were, no houses on the land when the grant was made. *Callis* says, that (a) he whose grounds are next adjoining to a highway, is bound to repair the same, which is clearly not the law at this day; but here, the plaintiff should have shewn that there was a duty imposed on the defendants to repair, and to what extent; and whether they were bound to repair generally, or merely to prevent the incursion of the sea.

Lastly, the plaintiff should have alleged that the defendants had funds in their hands applicable for carrying on the repairs, and that they were sufficient for that purpose; but he has not shewn that the corporation ever received any funds, and yet he has charged them with a general liability to repair. Although it is alleged, that the mayor and burgesses accepted the letters patent, there is nothing therein contained to constitute or impose a condition on them to receive tolls; and in *Rolle's Abridgment*, it is said (b), "If the King grant an advowson in fee, and further *concessit*, that the grantee may amortize this for the souls of the progenitors of the King; this is but a licence, and not a

(a) Page 88.

(b) *Tit. Condition*, C. pl. 2, Vol. 1, p. 407.

condition." In order, therefore, to maintain this action, the plaintiff should have shewn, either that the defendants were bound by a public duty to repair the banks in question, and which duty might be enforced by indictment, or that they had immemorially repaired the banks, so as to make them chargeable by prescription, or that they were liable *ratione tenuræ*.

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Lord Chief Justice BEST.—It appears by the first count of the declaration, that the defendants in this case are the grantees of the borough of *Lyme Regis*, and of the market, and of certain tolls and dues arising from the possession of the pier or cob; and that, by an act of Parliament relating to the borough of *Lyme*, which is a public act, these tolls and dues the corporation of *Lyme* have from all time had, at least, from all time within legal memory; but a verdict has been found for the defendants on all the counts which charge them as being liable to repair *ratione tenuræ*; and a verdict has been found for the plaintiff upon two counts only, which charge that these tolls (which were in the Crown before the granting of the last charter, and which had been before granted to the town of *Lyme* on different terms), were, in the time of *Charles the First*, granted to the town and borough of *Lyme*, together with the right of digging stones upon the shore to repair the very banks in question, in order that they might perform that which I cannot but consider the condition on which the grant was made, and whereon this question arises, *viz.* that the mayor and corporation of *Lyme*, and their successors, all and singular the buildings, banks, sea-shores, and all mounds and ditches within the borough of *Lyme*, or to the said borough in anywise belonging or appertaining, or situate between the same borough and the sea, and also the said building there, called the pier, quay, or cob, at their own costs and expenses, thenceforth from time to time for ever, should well and sufficiently repair, maintain, and support, as often as it

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should be necessary or expedient. The declaration then states, that, before the committing of the grievances in question, there were five messuages, five cottages, and five buildings, and divers closes of land, with the appurtenances, in the county aforesaid, to wit, in the borough aforesaid; and that, before and at the time of the committing of the grievances, &c., divers, to wit, five other messuages, five other cottages, five other buildings, and divers, to wit, twenty other closes of land, situate and being in the county aforesaid, to wit, in the borough aforesaid, were in the possession and occupation of divers persons as tenants thereof respectively to the plaintiff, the reversion thereof then and still belonging to him; all which said several messuages, cottages, buildings, and closes of land, with the appurtenances, before and at the times of the committing of the several grievances by the defendants as thereafter mentioned, were abutting on or near the sea shore there, to wit, at &c. aforesaid. The declaration then states, that, before and at the time of sealing of the said letters patent, and acceptance thereof by the said mayor and burgesses, and also at the time of the committing of the several grievances, (so that this allegation relates not only to the time of committing the grievances, but also to the time of granting the letters patent), divers, to wit, ten buildings, ten banks, ten sea-shores, and ten mounds, had been and were then respectively standing and being within the town and borough of *Lyme Regis* aforesaid, and divers, to wit, ten other buildings, ten other banks, &c., &c., had been and respectively were belonging and appertaining to the said borough, and divers, to wit, ten other buildings, &c., were standing and situate between the said borough and the sea, and then and there constituted and formed, and were a protection and safeguard (that is, at the time of the letters patent), and that they still of right ought to form and be a protection and safeguard to the messuages, cottages, buildings, and closes of land of the plaintiff, with the appurtenances, and then and

there have hindered and prevented, and still of right ought to hinder and prevent the sea and the waves and waters thereof, from running or flowing on, upon, against, or over the said several messuages, cottages, buildings, and closes of land aforesaid; all which buildings, banks, sea-shores, and mounds, the defendants, at the times of the committing the grievances, were, under and by virtue, and in pursuance of the letters patent and the acceptance thereof, liable, at their own proper costs and charges, sufficiently to repair. The first count of the declaration then goes on to state, that, in breach of this duty, the defendants permitted these buildings, sea-banks, mounds, &c., &c., to be ruinous, prostrate, and decayed, so that the sea came in and over-ran the ground, and the cottages thereon standing, and did the mischief which is the subject of the present complaint.

It has been insisted—*First*, that the plaintiff claims a degree of protection which the charter does not give him. I think there is no foundation for that argument, as the charter was given expressly for the purpose of protecting the land, and probably at that time there were no houses upon it; but the declaration goes on to state, that the banks and mounds which the corporation were to keep up, were for the protection of the land at the time of granting the charter, and that they have since been suffered to become in such a ruinous state, that they are incapable of protecting the land, and consequently the houses erected thereon have thereby suffered. I think the plaintiff has not made a larger claim to protection than he was warranted in making under the grant; and if he is entitled to any such protection, he may have a remedy for the absence of it, which by this action he seeks to enforce.

Secondly, it has been insisted, that the Crown might probably have a right to complain. It is true that this is a grant from the Crown, and it has been urged that, if the grantees have not complied with the conditions, the Crown

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might have a *scire facias* to turn them out, and thus; deprive the corporation of *Lyme* of the rights they hold under the charter, they not having fulfilled the trusts upon which those rights were conferred on them. But, on the other hand, it has been insisted, that a private individual cannot maintain an action for any injury he may have sustained in consequence of the corporation not having performed the trusts which the Crown reposed in them at the time of the grant; or rather, by their not having executed the duty which was the consideration upon which the grant was made. Now, I take it to be perfectly clear; that if a public officer abuse his office, either by the omission or the commission of an act, the consequence of which is the infliction of an injury on an individual, an action may be maintained against such public officer. Instances of this description are so numerous, that it is unnecessary to refer to them. What then constitutes a public officer? In my opinion, any person who is appointed to discharge a public duty, and receives a compensation for the discharge of such duty, whether he receive it from the Crown or not—in whatever manner such compensation be made, he is constituted a public officer. Although bishops are created by the Crown, they are not paid in money, but by estates which were granted to them, and in consequence of which grants certain duties have been imposed on them—such as holding Ecclesiastical Courts—and there can be no doubt, that, if a bishop neglect to hold such Court, whereby an individual is prevented from obtaining probate of a will, by which he sustains an injury, that an action would lie against the bishop for the consequence of such neglect. So, clergymen are public servants to a certain extent; and although they are not paid by, nor the emoluments that they receive have been derived from, the public, yet, they are derived from the owners of particular lands, who have endowed them with the glebe or lands which they possess as such; and they

have duties cast upon them by virtue of the tenure of such lands, and tithes payable from other sources—for instance, they are bound to administer the sacrament; and it has been decided, that if a clergyman refuse to administer it to a person who is thereby prejudiced in his civil rights, an action is maintainable against such clergyman. So, if he were to neglect to register a baptism, in consequence of which the person who ought to have been registered loses an estate, there can be no doubt but that an action would lie against the clergyman. The Bank of *England* are paid by the public as public officers, and if they refuse to transfer stock, an action is maintainable against them. Lords of manors hold courts, which they are obliged to do as one of the considerations on which the lands have been granted to them; and if such lord were to refuse or neglect to hold a Court, by which a copyholder was prevented from being admitted, there can be no doubt but that an action might be maintained against such lord. All these cases establish the principle, that if a man take a reward—whether it be in money from the Crown, or in land from the Crown, or in land or money from any individual for the discharge of a public duty, from that moment he is *quasi* a public officer; and, if through any act of negligence or abuse in his office, an individual sustain an injury, he is entitled to redress in a civil action. If that be so, it is quite clear that the plaintiff is entitled to recover in this suit, as he has in terms stated, that the defendants, as a corporation, had a compensation from the Crown for discharging a duty which they have neglected to discharge; and that, in consequence of such neglect, the plaintiff has sustained an injury, for which he is entitled to a compensation from them. But it has been said, that this only applies to acts done, and not to mere omissions. That argument cannot be sustained, because it appears from the report of the case of the Mayor of *Lynn v. Taylor*, that the party complained against was

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guilty of a mere omission or negligence, and not of an act of abuse of office. Although, therefore, that case appears to differ in other respects from the present, still it is an answer to the last objection.

Whether, therefore, the King was ever bound to keep up the sea-banks or not, still, the grant was made for the benefit of the public, for it cannot be supposed that it was meant to be confined to the good men of *Lyme*, or that they alone should be entitled to the advantage of it, or expend the dues so granted for their individual advantage or private gratification. It was granted to them expressly for the benefit of the public, and the instant they accepted it, they took upon themselves the responsibility of discharging those duties to the public which it is expressly declared they were to discharge at the time they accepted the borough, and, having neglected to do so, they have rendered themselves liable to be sued. That would be my opinion, although I were satisfied that the King was never bound to repair the banks. But I am convinced that he was at one time bound to repair them, and that he has shifted the burthen which belonged to him, upon those to whom he has granted the estate. Now, if the King were bound to repair the banks, and granted the estate to certain persons on condition that they should do so, there can be no doubt but that it is a valid and binding condition. If a man, who is bound to do certain acts by reason of the tenure of certain property, grant or lease any part of such property, he may make it a condition of his grant or lease, that the grantee or lessee should do that which the grantor or lessor was bound or ought to do. I do not mean to say that the King, by his general prerogative, is bound, out of any funds which belong to him, to repair sea-banks or walls. He never was so bound. In every book or treatise on the prerogative of the Crown, it is laid down, that the King is only bound to take care of and protect the shores

and lands adjoining the sea, from being overflowed by it: and he is to discharge that duty as it was discharged before the statute of *Henry* the eighth, by issuing commissions and making ordinances calling on persons who had lands near the sea, to do their duty in protecting their own, and the lands of others, from the incursions of the sea. Now, here, it appears that the King was once the owner of the lands and town of *Lyme*, as it is stated on the record that he granted the borough to the corporation of *Lyme*. Although, therefore, the King might not have had all the demesne lands in the town of *Lyme* at the time of the grant, yet it appears that at some time (and it is but fair so to presume), he was the owner of all the lands in the town of *Lyme*; and this may be assumed from the case of *Lord Pelham v. Pickersgill* (a), where it was decided, that if it be shewn that a person is lord of a manor, a presumption may be raised, that, at one time or other, either he, or his ancestors, were in possession of the demesne of the manor; because every one who is at all acquainted with the legal history of this country, knows, that, originally, all lands belonged to the lords of manors, and was by them granted out to tenants on different conditions and on different services. Proof, therefore, that a man is lord of a manor, is sufficient to raise a presumption, that in antient times he was the owner of all the lands within the manor. If so, and if the King were lord of the manor, and could grant the borough of *Lyme*, or the sea-shore, it is a ground on which a legal presumption may be raised, without its being stated on the record, that the King was at one time the owner of all the lands within the town of *Lyme*. If, therefore, he was such owner, was it not his duty at that time to repair the sea-banks? In *Callis on Sewers* (in which the statute of 23 *Henry* 8, c. 5, is most fully and ably commented upon), it is stated, that it is the

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duty of the King, at common law, to protect the shores from the running in, or incursions of the waters—but that it became necessary, in consequence of the sea gaining on particular parts of the shore, to have higher banks and mounds than particular individuals were bound to put; and that, therefore, it was necessary to raise such banks and mounds by taxation of other parts of the public who derived benefit from these walls. But who, in the first instance, was bound to repair, or to keep up the sea-banks? There is no material difference between sea-banks and mounds, and sea-walls, but both are here stated. The owner of the sea-banks is bound to keep them up; and those who had been in the habit of keeping up and repairing the sea-walls, were bound to keep them up. *Callis* says (a):—"Where the grounds of any man do join with the brow or front thereof to the sea, or to great or royal streams; and in case of the sea or royal rivers, the property of the banks and grounds adjoining, is and belongs to the subject whose lands do butt and bound thereon; but the soil of the sea and royal rivers do appertain to the King, as formerly in my tractate on rivers may appear. But in case of petty and mean rivers, and streams, the soil of them, as well as the banks thereof, do appertain to them whose grounds adjoin thereto; so that frontage and ownership in base inferior rivers do not differ; but in great streams and the sea they do vary as aforesaid: and it seems that the frontagers are bound to the repairs, and he whose grounds are next adjoining to a highway is bound to repair the same." It has been said, however, that this is stated too largely; and, certainly, if it is to be taken that the owner of lands adjoining every highway is bound to repair the highway, it is too large. But what I apprehend the writer meant is, that where a man has inclosed on the highway, then he is bound to repair it. That is good law:—and in this case

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there is, in my opinion, no difference between repairing great streams and highways. *Callis* then says (a): "The ownership of a bank or wall, or other defence, is a sufficient warrant to impose the charge of repairs thereof upon the owner, without being tied thereto by prescription." If, therefore, the ownership of a bank or wall is sufficient to impose on the owner the charge of the repairs without prescription, the King, in this case, when he granted the banks or walls, must have been the owner—if not, he could not have made the grant: and if he were the owner of the banks or walls, he, as such, according to the authority of *Callis*, was bound to repair; and if, as such owner, he was bound to repair without any prescription;—when he made the grant, why could he not cast the obligation on the grantees? It is clear, from what is stated on the record, that the King was bound to repair, as owner of the town of *Lyme Regis*, (which probably is so called from the property of the town being in the King); and if so, he was bound, as the owner of the lands in the town, and as the owner of the banks and walls in question, to repair them when he made the grant to the town. When he granted to the corporation of *Lyme* the profits and advantages of the tolls and dues, he transferred, at the same time, the liabilities which the receipt of those profits and advantages imposed upon him, to those to whom he had transferred them, and from the instant the grant was made, the liability which was originally in the King—not as King, but as owner of the lands of *Lyme Regis*—was transferred to those to whom he transferred the property, *viz.* to the corporation of *Lyme*. It seems to me, therefore, that if it be necessary that it should appear that there was any liability in the King to repair, it does so most distinctly by what is stated on the record, and by what we are also bound to take notice of, *viz.* the act of Parliament. That being the case, I am of opinion that it sufficiently appears by

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the record that the defendants were bound to repair. But it has been said, that it does not appear that they have any funds for that purpose:—but so long as they hold the estate, whether it produces funds or not, they are bound to repair; and when they do not chuse to undertake the repair, they may desire the King to take back the estate. The moment they accepted the charter, they contracted the liability to repair the walls; and that liability will attach itself to them as long as they continue to be the owners of the estate. It would be highly dangerous to allow a corporation, which takes lands under the circumstances in which this corporation has taken them, to say—“Although we have taken the lands *cum onere*, and subject to these repairs, we have no funds to enable us to repair.” In such a case, it would be necessary for the Court to inquire how those funds have been employed or used; but it would be an extremely improper thing to impose the necessity for such an inquiry on any Court. It is said, that the learned Judge who tried the cause rejected evidence in this respect; and he did perfectly right in so doing. The public have nothing to do with that question; nor has the plaintiff: all the latter had to inquire into was, who were liable to repair the walls.

On these grounds, I am of opinion, that there is no reason to arrest the judgment which has been entered up on the two first counts of the declaration.

My brother *Gaselee* has intimated to me that the defendants can only be *commonly* liable to repair, or to keep the walls &c. in *sufficient* repair. This is certainly all they are bound to do. I remember an issue directed by the Lord Chancellor, and which I tried at *Gloucester*, to ascertain whether the owners of certain lands in that county, who were bound to keep certain sea-banks or mounds in repair, were answerable for a particular loss that had happened; and I was directed to inquire, whether the loss had accrued in consequence of an extraordinary high flood of the sea, or in consequence of the mounds not being kept

in proper repair. The Jury found, that the mounds were kept in good repair, and that the accident had happened from such a high tide as had never before been known, from the circumstance of a strong westerly wind blowing up the river at the time of high-water; and it was said, that although the person who was bound to keep up the mounds, was bound to keep them in a proper state, still that he was not bound to build them, so as to protect the land from any deluge which it might please Providence to send. So, here, I should say, that if it had appeared that the damage had not happened from any defect in the walls, but from an extraordinary high flood, the defendants would not have been liable for the damage, or bound to make good the repairs. But it was decided in the case of *The King v. The Commissioners of Sewers for Essex (a)*, that, if a man is bound to repair sea-walls, although the flood be very high, yet, if the Jury find that the walls were out of repair, he is liable, because he was bound to repair; for probably the high flood would not have occasioned the mischief, if the walls had been in the state in which he was bound to keep them. Let us apply that doctrine to the present case. If there had been a high flood, or an extraordinarily high tide, it was matter of defence. But it is distinctly stated on the record, that the mischief happened from the walls being suffered to lie prostrate, ruinous, and in decay; so that the mischief did not arise from the act of God, which is not to prejudice any one, according to the well known maxim of law; but the mischief arose entirely from the negligence of man, and from such negligence alone.

Mr. Justice GASELEE.—It has been stated in the course of the argument, that the obligation to repair is alleged too largely in the declaration, (it being laid to keep the walls in repair, so as to prevent the waves of the sea from overflowing the lands); but, by analogy to the case of a com-

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(a) 1 Barn. & Cress. 477; S. C. 2 Dowl. & Ryl. 700.

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mon carrier; whose liability arises from his duty to carry safely and securely, it is not necessary to state the exceptions of the act of God and the King's enemies, they being the well-known exceptions. The liability of the carrier may be stated generally. So, here, it was properly alleged to be a general obligation on the part of the defendants to repair the walls; and if, by the act of God, an extraordinary storm had come on, and occasioned the damage, that would have been matter of defence: but it was not necessary to qualify the allegation in the declaration.

Rule discharged.

In an action on the case, charging the defendants (a corporate body), with the non-repair of sea-banks, the declaration contained five counts, the two first, stating the defendants' liability to repair, by virtue of a charter from the Crown, and the others by prescription, and *ratione tenuræ*. At the trial, a verdict was taken for the plaintiff by consent, on the two first counts, and the Jury were discharged as to the other three. The Court, on the application of the plaintiff, ordered the *postea* to be amended, and the verdict to be entered on the first count only, although the Judge who tried the cause declined to interfere:—on the grounds that the evidence was applicable to both counts, and that separate damages could not have been found or assessed.

In the following *Michaelmas* Term, *viz.* on the 12th *November*, 1828, an application was made to the Court by Mr. Serjeant *Wilde*, on the part of the plaintiff, that the *postea* might be amended, and the verdict entered up on the first count of the declaration only. Upon which the Lord Chief Justice ordered the above rule for discharging the motion in arrest of judgment to be suspended, and an application to be made to the learned Judge who presided at the trial; and it was afterwards directed, that all further proceedings in the cause should be stayed, until the further order of the Court. The parties accordingly attended before Mr. Justice *Littledale*, on the 18th *December*, 1828; and after hearing counsel for the plaintiff and defendants, he declined to interfere, on the ground that the verdict had been entered for the plaintiff on the *first and second* counts, by the consent of counsel on both sides at the trial; and he therefore said, that he did not feel himself warranted in altering the terms of that agreement without the assent of both parties; and on the defendants' refusal to have the *postea* amended, by entering the verdict on the first count only, the learned Judge, at the

plaintiff's request, sent his notes of the trial to the Lord Chief Justice of this Court.

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In the last *Hilary* Term, Mr. Serjeant *Wilde* obtained a rule *nisi*, that the verdict might be entered on the first count; and he produced affidavits, which stated that all the evidence adduced at the trial was applicable to that count; and he submitted, that although it was usual to make an application of this nature to the Judge who tried the cause, still, that this Court not only had jurisdiction, but were fully authorized to order a verdict to be entered on any particular count of a declaration. And he referred to the cases of *Eliot v. Skyppe* (a), *Williams v. Jones* (b), *Hankey v. Smith* (c), *Newcomb v. Green* (d), *Spencer v. Goter* (e), *Petrie v. Hannay* (f), *Williams v. Breedon* (g), and *Doe d. Church v. Perkins* (h).

Mr. Serjeant *Taddy*, in the last Term, was about to shew cause, when the Court ordered the rule to be enlarged to the present Term, in order that they might look into the authorities on the subject.

Mr. Serjeant *Taddy* and Mr. Serjeant *Merewether* now shewed cause, and insisted that this Court had no authority to interfere without the concurrence of the Judge who tried the cause; and as the counsel for both parties expressly agreed at the trial, that the verdict should be entered on the first and second counts, such agreement was conclusive; and the learned Judge most properly thought that he was bound by it. In all the cases referred to in support of the application, there was no consent of the parties that the verdict should be taken on any particular counts; and, although in *Richard-*

(a) Cro. Car. 338.

(b) Cooke's Cas. Prac. 118.

(c) Barnes, 449.

(d) 2 Str. 1197; S. C. 1 Wils. 33.

(e) 1 Hen. Bl. 78.

(f) 3 Term Rep. 659.

(g) 1 Bos. & Pul. 329.

(h) 3 Term Rep. 749.

son v. *Mellish* (a), where the declaration contained some counts which were bad in law, and the Jury found a general verdict for the plaintiff, but the evidence applied to the first count only, this Court, even after argument in error in the Court of *King's Bench*, allowed the *postea* to be amended, by entering the verdict for the plaintiff on the first count, and for the defendants on the others:—yet there, the application was made by the advice of Lord *Gifford*, who tried the cause, and who had been promoted to the office of Master of the *Rolls*, after the trial, and before the rule for the amendment was obtained. The Court, therefore, had not only his notes of the trial before them, but his express wish that the motion should be made. In *Spencer v. Goter*, the Court said, that they would not alter a verdict, unless it clearly appeared on the face of it, that the alteration would be agreeable to the intention of the Jury; and here, counsel consented that the verdict should be entered for the plaintiff on the two first counts, before the defendants had called all their witnesses. There is a wide distinction between the first and second counts; and it is quite clear that the latter cannot be supported at law, as the plaintiff has not alleged that the defendants became possessed by virtue of the charter, but merely that they accepted it. Although in *Eddowes v. Hopkins* (b), upon a general verdict on a declaration consisting of different counts, some of which were bad in point of law, and evidence had only been given on those which were good;—it was held, that the verdict might be amended by the Judge's notes, yet, that was an action of *assumpsit*, founded on a breach of contract; and Mr. Justice *Buller* drew the distinction between a case where the cause of action arises on a contract, or for a tort; as in an action for words, where some actionable words are laid, and some not actionable, and evidence given of both sets of words, and a general verdict; there,

(a) 11 B. Moore, 104; S. C. 3 Bing. 334. (b) 1 Doug. 376.

the *postea* cannot be amended, because it would be impossible for the Judge to say on which of the counts the Jury had found the damages, or how they had apportioned them. So, in *Richardson v. Mellish*, the plaintiff brought *assumpsit* for a breach of an agreement; whilst here, the defendants are sued in tort; and as the evidence applied equally to both counts on which the verdict was entered up, and one is not sufficient in law, the defendants are entitled to a *venire de novo*. There is a great difference between charging the defendants with a liability to repair by virtue of their being possessed under the letters patent, or by the mere acceptance of the charter; and the charter ought to have been set out as fully, and with the same precision, in the second count as in the first, to make the defendants liable in an action for non-feasance. In *Grant v. Astle*, which was an action of *assumpsit* by the lord of a manor, for fines on admission to a copyhold, and the declaration contained several counts, some stating one fine to be payable, and others several;—and entire damages were assessed for the plaintiff, and the defendant brought a writ of error, the Court awarded a *venire de novo*, and Lord Mansfield said (a): “In civil cases the rule is now settled, and we have gone as far as we can by allowing verdicts to be amended by the Judge’s notes.” Here, however, the Court will not interfere, as the Judge who tried the cause refused to sanction the amendment; and if it were permitted, it would be inconsistent with the express agreement entered into by the parties at the trial, which is conclusive on them, and by which they must be bound.

Mr. Serjeant *Wilde*, in support of his rule.—The learned Judge intimated a clear opinion at the trial, that the plaintiff was entitled to a verdict on the two chartered counts, in which the cause of action is the same, and in

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which the defendants are charged with a liability to repair under and by virtue of the charter. The same evidence was clearly applicable to both, and several damages could not be assessed; and it is a well known and established rule, that if a plaintiff declare for the same cause of action in several counts, and the Jury find a general verdict, the Court may direct it to be entered up on those counts to which the evidence applied. The consent of counsel at the trial, to have the verdict entered on the two first counts, was not meant to restrain the plaintiff from entering it upon the *first*, but merely to confine him to those two counts alone; and the Jury were discharged as to the others, which charged the defendants with a liability to repair by prescription, and *ratione tenuræ*. The plaintiff proved that the defendants were liable to repair by virtue of the charter, which distinguishes this case from an action for words, where some are actionable and some not:—and in *Lee v. Muggeridge (a)*, where a general verdict was taken for the plaintiff, the Court compelled him to elect on which count it should be entered up; and here, as the Judge's notes have been transmitted to the Court, they have clearly an authority to order the *pos- tea* to be amended on the terms as prayed.

LORD CHIEF JUSTICE TINDAL.—The plaintiff has applied to us for leave to enter the verdict found for him in this cause, on the first count of the declaration only, although, at the trial, it was entered by the consent of the plaintiff's and defendants' counsel on the first and second counts, which charged the defendants with the repair of the banks in question, by virtue of a charter from the Crown. On looking at the nature of the agreement between the parties, we are of opinion that we shall substantially carry it into effect by acceding to the plaintiff's request. If, indeed, damages could have been given on the second

(a) 5 Taut. 36.

count, which could not have been given on the first, or the ground of action in each count were substantially different, we would not have yielded to the application, without the sanction or concurrence of the learned Judge who tried the cause. But, on looking carefully through the whole of the declaration, it appears to us that the cause of action in the first and second counts is in substance the same. The same charter is set out in both, and the only difference is in the mode of setting it out. No separate damages could possibly have been given, as both counts contain the same cause of action, and the same evidence was applicable to both. The only distinction is, that, in the first, the liability of the defendants to repair is alleged to be in consequence of their being in possession under the charter; and in the second, the liability is stated to be imposed on them by virtue of *their acceptance* of the charter. We shall therefore carry the agreement into effect by allowing the plaintiff to enter up his verdict on the first chartered count, in which he supposes that his cause of action is more fully and accurately stated. If, indeed, we were to refuse the application, and a Court of error should consider the second count not to be substantially good, and a *venire de novo* were to be awarded, we should be only putting the parties to unnecessary expense, because the plaintiff would be entitled to damages on the first count only, the cause of action being, in substance, the same in both. The rule, therefore, to enter the verdict on the first count, must be made—

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Absolute, on payment of costs.

Mr. Serjeant *Taddy* insisted that the first count was bad in substance. But the Court held that it was now too late to raise an objection to it; and that the defendants might, if so advised, bring a writ of error, and question its validity in the Court above.

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Saturday,
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A rule for judgment as in the case of a nonsuit for not proceeding to trial at the Sittings pursuant to notice, was discharged, upon the plaintiff's giving a peremptory undertaking to try at the next Sittings. The rule was silent as to costs. Afterwards, another rule was drawn up by consent of the parties, and by which it was ordered that the plaintiff should pay the defendant his costs for not proceeding to trial at the former Sittings, unless the plaintiff should shew sufficient cause to the contrary, to the Prothonotary at the time of taxation. The Prothonotary having refused to allow the defendant such costs, the Court refused to direct him to review his taxation.

A RULE for judgment as in the case of a nonsuit, for not proceeding to trial in this cause, at the Sittings in *London*, was discharged in the last Term, *viz.* on *Saturday*, the 30th of *May*, upon the plaintiff's giving a peremptory undertaking to try at the next Sittings; but the rule was silent as to costs. Upon the *Monday* following, *viz.* on the 1st of *June* last, the following rule was drawn up by consent—

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Upon reading a rule made in this cause on *Friday* the 22nd of *May*, and the affidavit of the plaintiff in this cause, and upon hearing counsel for both parties:—it is ordered, that the said rule be, and the same is hereby discharged; the plaintiff, by his counsel, hereby undertaking peremptorily to proceed to the trial of this cause, at the Sittings after the next *Trinity* Term, to be holden at *Guildhall*, in and for the city of *London*.—And it is further ordered, that the plaintiff do and shall pay to the defendant, or his attorney, costs to be taxed by one of the Prothonotaries of this Court, for the plaintiff's not proceeding to the trial of this cause, at the Sittings after *Trinity* Term, 1828, and also at the Sittings after the last *Michaelmas* Term, pursuant to notice duly given, unless the plaintiff, after notice of this rule, shall shew sufficient cause to the said Prothonotary to the contrary, at the time of such taxation.

On the attendance of the parties before the Prothonotary in the course of the last vacation, the defendant claimed costs incurred by him and his witnesses, during six days' attendance at the Sittings after the last *Michaelmas* Term, on which latter day the plaintiff withdrew his record. But the Prothonotary, after hearing both parties, and fully inquiring into all the facts,

refused to allow such costs, and also the costs of briefs delivered by the defendant's attorney to counsel, at the commencement of such Sittings.

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Mr. Serjeant *Taddy*, on the first day of this Term, upon an affidavit of these facts, obtained a rule *nisi*, that the Prothonotary might review his taxation, and allow the defendant all the costs incurred by him during his attendance at the Sittings after the last *Michaelmas* Term, pursuant to the notice of trial given him by the plaintiff.

Mr. Serjeant *Bompas* now shewed cause. By the terms of the last rule, which was special in its terms, and drawn up by consent, and upon hearing counsel for both parties, the costs for the plaintiff's not proceeding to trial at the Sittings, pursuant to notice, were to be paid to the defendant, unless the plaintiff shewed the Prothonotary sufficient cause to the contrary at the time of taxation; and as he heard what each party had to adduce, it must be now assumed that the plaintiff did shew sufficient cause. Besides, costs incurred by the defendant for attending the Sittings, cannot be allowed, where a rule for judgment as in case of a nonsuit is discharged upon a peremptory undertaking; but can only be given on a rule for costs for not proceeding to trial pursuant to notice. The first rule was silent as to costs; and in *Clarke v. Simpson* (a), it was held, that a defendant who moves for costs for not proceeding to trial, cannot have judgment as in case of a nonsuit for the same default. But here, by the terms of the last rule, the costs were left in the discretion of the Prothonotary; and the defendant has shewn no substantial ground to induce the Court to require him to review his taxation.

Mr. Serjeant *Taddy*, in support of his rule.—The Protho-

(a) 4 Taunt. 591.

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notary was bound, according to the practice of the Court, to tax the defendant his costs incurred at the Sittings, in consequence of the plaintiff's withdrawing his record; and the amount of such costs was only referred to him by the last rule; and if the defendant can be deemed not to be entitled to such costs, he must be put to further expense by procuring another rule for costs for the plaintiff's not having proceeded to trial pursuant to notice, which is contrary to practice, as the defendant must make his election either to move for costs for not proceeding to trial, or for judgment as in case of a nonsuit; and it is usual for him to move for the latter; upon which, if the Court, on shewing cause, grant further time to the plaintiff, it is generally, if not always, on the condition of his paying costs for not proceeding to trial (a); and in *Jolliffe v. Morris* (b), it was expressly decided, that costs for not proceeding to trial, may be given on the motion for judgment as in case of a nonsuit. So, by a rule of this Court (c), it was ordered that where notice is given of the execution of a writ of inquiry, and not countermanded in time, the defendant shall be entitled to costs from the plaintiff for not executing such writ, in the same manner as a defendant, by the course of the Court was then entitled to costs from a plaintiff who does not proceed to the trial of an issue joined, after notice given; and in *Jones d. Wyat v. Stephenson* (d), where some of the plaintiff's witnesses were disabled by illness from attending the trial at the assizes, although it was held to be a sufficient excuse to prevent a nonsuit, yet time was given to the plaintiff to try peremptorily at the next assizes, *on payment of costs for not proceeding to trial at the last assizes*. So, here, as the plaintiff withdrew his record at the Sittings, after giving the defendant notice of trial for such Sittings, he ought to have been al-

(a) See Tidd's Practice, 9th Edit.
 Vol. 2, 759.

(b) 1 Bos. & Pul. 38.

(c) Trin. 13 Geo. 2, 1739.

(d) Barnes, 316.

lowed his costs for his attendance there, as well as for the briefs he had caused to be delivered to his counsel. *Jordaine v. Sharpe* (a).

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LORD CHIEF JUSTICE TINDAL.—I think that this rule, which calls on the Prothonotary to review his taxation, must be discharged. The rule for judgment as in case of a nonsuit, for the plaintiff's not proceeding to trial in this cause, which was moved for on the 22nd May, was discharged generally on the 30th, upon the plaintiff's giving a peremptory undertaking to proceed to trial at the next Sittings. The officer, therefore, was only authorized to draw up the rule in the ordinary form, as there was no mention of costs. But, by a subsequent agreement between the parties, a special rule was drawn up by consent, by which the costs were left in the discretion of the Prothonotary, and the plaintiff was to pay the defendant his costs for the plaintiff's not proceeding to trial at the former Sittings, unless the plaintiff shewed sufficient cause to the contrary. If the parties had stood on the original rule, the costs would be costs in the cause; and on the special rule the Prothonotary has exercised his judgment, and, after hearing both parties, has refused to allow the defendant his costs for attendance at the previous Sittings. Therefore, *quacunqve via data*, the defendant is in the same state; and it would be too much for us to say, that justice has not been done, or that the Prothonotary has not come to a right conclusion.

MR. JUSTICE PARK.—The parties entered into a special rule by consent, by which the costs for the plaintiff's not proceeding to trial at a former Sittings, pursuant to notice, were left in the discretion of the Prothonotary; and after hearing the parties, and investigating all the cir-

(a) 2 Hen. Bl. 280.

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cumstances of the case, he thought that the defendant did not assign a sufficient cause to be allowed the costs he claimed for attending at such Sittings; and I have no doubt but that he exercised a sound discretion.

Mr. Justice BURROUGH concurred.

Mr. Justice GASELEE.—At first, I was not aware of the terms of the last rule, by which it was left to the Prothonotary to say, whether the defendant should be paid his costs, for the plaintiff's not having proceeded to trial pursuant to notice; and after hearing what each party alleged, he thought that such costs ought not to be allowed. Perhaps, in future, when a rule for judgment as in case of a nonsuit is discharged on a peremptory undertaking to try at the next Assizes or Sittings, it should be part of the rule that the costs occasioned by the defendant's attendance at a previous Sittings, if actually incurred, shall be paid by the plaintiff, on the Prothonotary's ascertaining their amount.

Rule discharged, without costs.

Monday,
June 29th.

PHILPOTT v. DOBBINSON.

Although a landlord may avow generally for rent in arrear, under the statute 11 Geo. 2, c. 19, s. 22, yet the terms of the contract under which the

tenant holds, must be truly stated in the avowry. Where, therefore, the defendant made cognizance as bailiff of J. S., whose tenant he alleged the plaintiff to be, under a demise before then made to the plaintiff at a certain yearly rent; and the plaintiff pleaded, *non tenuit, modo et formd.*—*Held*, that the cognizance was not supported by proof of a conveyance under which J. S. claimed, and which purported to have been made by three trustees, but was executed by two only; as J. S. thereby only took two-thirds of the premises, as tenant in common with the trustee who had omitted to execute the deed.

THIS was an action of replevin for taking the plaintiff's goods, in a certain dwelling-house, situate in the parish of St. Mary-le-Bone, in the county of Middlesex. The defendant made cognizance as bailiff of one William George Tate, and well acknowledged the taking, because he said,

that the plaintiff, for three quarters of a year, next before, and ending on the 24th *June*, 1828, and from thence until and at the said time when, &c., held and enjoyed the said dwelling-house and premises with the appurtenances, in which, &c., as tenant thereof to the said *William George Tate*, by virtue of a certain demise thereof to him, the plaintiff, theretofore made, at and under the yearly rent of 170*l.*, payable quarterly; and because the sum of 127*l.* 10*s.* of the rent aforesaid, for the space of three quarters of a year, ending on, &c., and from thence until and at the said time when, &c., was due and in arrear from the plaintiff to the said *William George Tate*;—the defendant, as his bailiff, well acknowledged the taking, &c. The plaintiff pleaded in bar, *first*, that he did not hold or enjoy the said dwelling house, in which &c., as tenant thereof to the said *William George Tate*, under the said supposed demise thereof in the said cognizance mentioned, *in manner and form* as the defendant had, in his said cognizance, in that behalf alleged. *Secondly*, that no part of the supposed rent in the said cognizance mentioned, was or is in arrear from the plaintiff to the said *William George Tate*, *modo et formâ* as the defendant had in his cognizance in that behalf alleged. On which pleas issues were joined.

At the trial, before Lord Chief Justice *Tindal*, at *Westminster*, at the Sittings after the last Term, *William George Tate* claimed the rent in question, as heir-at-law of his father *William Tate*; and it appeared, that the plaintiff was let into possession under a lease for twenty-one years, granted to him by one *Joseph Bradney*, on the 1st *January* 1819, who, at that time was seised in fee of the house in question, and to whom the plaintiff paid rent. That, previously to his death, he devised the premises to three trustees in trust for sale; and that, shortly after his decease, which took place in 1824, the three trustees were made parties to deeds of lease and release, dated on the

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30th and 31st *December*, in that year; and by which the house in question was conveyed to *William Tate*. The deeds purported to have been executed by the three trustees; but, on their production, they appeared to have been executed by two of the trustees only; upon which it was objected for the plaintiff, that the cognizance could not be supported, as the defendant had acknowledged the taking the plaintiff's goods for rent due to *William George Tate*, as though *the entire interest* in the premises was in him, whereas, by the conveyance to his father *William Tate*, he took only two-thirds, of which he was tenant in common with the outstanding trustee, who had omitted to execute the deeds, and who was, consequently, seised of the remaining one-third. The Lord Chief Justice directed the Jury to find a verdict for the defendant, and to assess the damages at two-thirds of the value of the rent distrained for, reserving to the plaintiff leave to move to set aside the verdict, and that a verdict might be entered for him instead thereof, in case the Court should be of opinion that the cognizance was not supported; the defendant having alleged that the plaintiff held the whole of the premises under *William George Tate*, at the yearly rent therein mentioned; whereas, it appeared, that only two-thirds of the property were conveyed to *William Tate* the father, whose interest the son took, and by virtue of which conveyance the present distress could alone be supported.

Mr. Serjeant *Wilde*, on a former day in this Term, accordingly obtained a rule *nisi*, and submitted, that as one-third of the property intended to have been conveyed under *Bradney's* will to *William Tate* was still outstanding in one of the devisees in trust, and the defendant made cognizance as bailiff of *William George Tate*, who claimed by operation of law, as heir of his father *William Tate*, the defendant ought to have acknowledged the taking for two-thirds of the rent only; whereas he has alleged

that the full rent was due to *Tate* for the whole of the premises. Therefore, the contract, by virtue of which it is alleged that the plaintiff holds under *William George Tate*, is not correctly set out in the cognizance. *Littleton* (a) lays it down as an established rule of law, that tenants in common must sever in an avowry for rent, unless the rent reserved be a hawk, or an horse, or any other entire thing, which cannot be severed. In *Viner's Abridgment* (b), it is said, that tenants in common shall join in an action of debt for rent reserved by them, upon their lease for years, and yet, in an avowry for the same rent, *they ought to sever*; for this is by reason of the reversion, which is several. In *Midgley v. Lovelace*, Lord Chief Justice *Holt* said (c), "if tenants in common sever in debt, &c., they must not each of them make his demand of such a certain sum which amounts to a moiety, but the demand must be *de undâ medietate* of the whole rent." In *Harrison v. Barnby* (d), it was held, that a terre-tenant holding under two tenants in common, cannot pay the whole rent to one, after notice from the other not to pay it; and that, if he do, the other tenant in common may distrain for his share. And in *Culley v. Spearman* (e), this Court decided, that one tenant in common cannot avow *alone* for taking cattle *damage feasant*, but that he ought also to make cognizance as bailiff of his companion.

Mr. Serjeant *Taddy*, and Mr. Serjeant *Merewether*, now shewed cause.—The defendant has made cognizance as bailiff of *William George Tate*, and alleged, that the plaintiff held the premises as tenant to him, by virtue of a demise thereof to the plaintiff before made, at the yearly rent of 170*l.*, payable quarterly. All these allegations are true in point of fact, as the plaintiff held under a lease

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(a) Sections 314, 317.

(c) Carth. 289.

(b) Tit. *Actions* [*Joinder*], (Z.

(d) 5 Term Rep. 246.

c.) pl. 26, 27.

(e) 2 H. Bl. 386.

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from *Bradney* on those terms, and the plaintiff, in his plea in bar, has merely alleged, that he did not hold as tenant to *Tate*, in manner and form as in the cognizance is alleged; but he does not deny that there was such a demise as is therein mentioned. The cognizance is in general terms, and framed under the statute 11 *Geo. 2*, c. 19, s. 22, which obviates the difficulty and inconvenience formerly experienced by landlords in being obliged to set out their title with the nicety and precision required by the common law. Although *William George Tate* might be only entitled to two-thirds of the rent, yet, by virtue of the conveyance to his father, the plaintiff held as tenant to *Tate*; and admitting that tenants in common must sever in an avowry, the defendant has in fact done so, as he has made cognizance as bailiff of *Tate* alone, and not of the trustee, as his co-tenant or companion. The case of *Culley v. Spearman* is distinguishable, as there the tenant in common avowed for taking cattle *damage feasant*, which was an injury to the possession, as the taking the cattle was taking a pledge for satisfaction for that injury. *Littleton* says (a), "if two tenants in common make a lease of their tenements to another for a term of years, rendering to them a certain rent yearly during the term, if the rent be behind, the tenants in common shall have an action of debt against the lessee, and not divers actions, for that the action is in the personalty; but that, in an avowry for such rent, they ought to sever, for this is in the realty." But, it is not now necessary that a tenant in common should set out the precise nature of his interest in an avowry, he may claim the whole rent, and prove that a part only is due. So, a part owner of a ship may claim the whole freight due, whereas he is only entitled to recover according to his proportionate interest in the vessel. An avowry for rent need not be more precise than a declaration;

(a) Sections 316, 317.

and, under an avowry for a year's rent, it is quite clear, that the landlord will be entitled to recover for a quarter, if he prove that such rent be due. In *Claworthy v. Mitchell* (a), the defendant avowed for rent, and shewed that his father was seised, and let for years rendering rent, and died, and that the reversion descended to the defendant, and so he avowed for the whole of the rent in arrear; and the plaintiff replied that the father devised the reversion to another. The Jury found, that the devise was only of two parts, and not of the third, the lands being held by knight's service; and it was held, that the avowant should have return for the third part, as there appeared to be a sufficient certainty to the Court to make an apportionment; and judgment was given for him accordingly. In *Grills v. Mannell* (b), the defendant, in her avowry, alleged that the plaintiff was seised of the reversion in fee, and the plaintiff, in his plea in bar, traversed the seisin in fee in him, and alleged that the defendant *was only seised for life*, the reversion in fee belonging to another; but such plea was held bad on demurrer, because it admitted that the defendant had an estate sufficient to justify the distress. Though, in *Pullen v. Palmer* (c), it was held, that although one joint-tenant may distrain for the whole rent, yet he cannot avow for the whole, for that an avowry is in the nature of an action, and is a demand in law of the rent; yet that case was decided before the statute 11 Geo. 2 was passed, and the defendant's title was fully set out in the avowry. In *Forty v. Imber* (d), the defendant, in his cognizance, alleged, that for two years *and a quarter* ending at *Christmas*, 1803, the plaintiff held the premises as tenant to *A. B.* by virtue of a certain demise; to which the plaintiff pleaded *non tenuit, modo et formā*; the defendant was held

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(a) Winch, 49.

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(b) Willes, 378.

(d) 6 East, 434.

(c) Carth. 328; S. C. 3 Salk.

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to be entitled to a verdict, on proof that the plaintiff held of *A. B.* from the 23rd *December*, 1801, and that he might recover for *two years' rent*, instead of two years and a quarter; and Lord *Ellenborough* there said, "it is unnecessary to revert to cases before the statute of 11 *Geo. 2*, c. 19, s. 22, which meant to relieve landlords from the difficulties which they before laboured under in making avowries for rent, and gives the avowry and cognizance in as general terms as possible. And there has been no case since that statute, where, if it turned out that less rent was due than the defendant had avowed for, he has not been holden to be entitled to recover for so much as was due. It is the constant practice." In *Hargrave v. Shewin* (a), in replevin for taking the plaintiff's corn in four closes, the defendant avowed for rent in arrear, alleging that the plaintiff held the closes at a certain yearly rent; and it appeared in evidence, that the tenant held the four closes mentioned in the declaration, and two others also, at the rent mentioned in the avowry; and it was held, that the evidence supported the avowry, as each part of the land was liable to the whole rent, and that a distress for the whole might have been taken on any part of the land demised. Here, it is averred, that the plaintiff held as tenant to *Tate*, by virtue of a demise made to the plaintiff; but it is not stated, that the demise was made by *Tate*, or that the plaintiff held under him alone; and as the plaintiff has only pleaded that he did not hold as tenant to *Tate*, in manner and form as in the cognizance alleged;—whether *Tate* were or were not entitled to the whole, or only to two-thirds of the rent, was not a matter in issue between the parties. In *Pope v. Skinner* (b), to an avowry for cattle taken *damage feasant*, the defendant avowed the taking under a right of common, and the plaintiff pleaded, that one *W.* demised the land to him on a certain day, and

(a) 6 Barn. & Cress. 34; S. C. 9 Dow. & Ry1. 20. (b) Hobart, 72.

the defendant traversed the lease by *W.* to the plaintiff, *modo et formā*; and although the commencement of the lease and time of making it were mistaken, yet the Court held, that if it were proved in substance it was sufficient, and that the words *modo et formā* should not put the circumstances in issue, the only question being, whether the party had a lease or not. So, here, the averment, that the plaintiff enjoyed the premises as tenant to *Tate*, by virtue of a demise, was true in substance, and it was not stated that the demise was granted by *Tate*; and the plaintiff has merely alleged that he did not hold under him in manner and form as in the cognizance is alleged; and it was proved that the rent was payable by the plaintiff to *Bradney*, from whom the premises passed to *Tate*, in the terms alleged;—by virtue of the lease granted to the plaintiff by *Bradney*. In *Page v. Chuck* (a), the defendant avowed for rent in arrear, for a dwelling-house with the appurtenances, and it was proved that the plaintiff only occupied the upper part of the house, and that the shop and yard were in the occupation of other tenants; and it was held to be no variance; and Lord Chief Justice *Best* said, “in an action of replevin, it is sufficient if the substance of the issue be proved.” Here, the terms under which the plaintiff held were proved in substance; and, as the verdict was entered for the defendant for two-thirds of the rent alleged to be due, it will meet the justice of the case, as *Tate* was clearly entitled to distrain for that amount.

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Mr. Serjeant *Wilde*, in support of his rule.—The principle, that tenants in common must sever in an avowry for rent, has not been denied, and is applicable to all cases, except the rent reserved be of a thing which cannot be severed, as in the instances put by *Littleton*; and here, the question arises on the nature of the holding or tenan-

(b) 10 B. Moore, 264.

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cy of the plaintiff, and not on the landlord's right or title to the rent. In *Harrison v. Barnby*, Lord *Kenyon* said (a), "tenants in common ought to avow for their separate portions:"—the same principle was established in *Pullen v. Palmer*; and *Viner* is also an express authority on this point. Here, the issue was, whether the plaintiff held as tenant to *Tate*, by virtue of a demise to the plaintiff, at the yearly rent in the cognizance mentioned. It is quite clear that he did not, for it was proved, that *Tate* was only tenant in common, and entitled to two-thirds of the rent; but the defendant has made cognizance for the whole, and led the plaintiff to believe that the entire estate was vested in *Tate*; whereas, in fact, the other tenant in common might distrain for the rent due to him, and there is nothing like a severance on the face of the cognizance, and *Tate* himself could not have avowed for the rent due, without making cognizance as bailiff of his companion or co-tenant. Although, since the statute 11 *Geo. 2*, c. 19, a landlord may avow, or his bailiff make cognizance in general terms, yet the substance of the avowant's title must be stated, and the contract upon which the rent becomes due must be truly set forth, according to *Brown v. Sayce* (b), where the defendant, having avowed on a contract for 110*l.* rent, and proved a demise amounting to 111*l.*, it was held to be a fatal variance, as the verdict on that issue would be evidence of the amount of the rent between the same parties in another action. In *Claworthy v. Mitchel*, the question turned entirely on the issue raised by the pleadings as to the terms of the devise, which was set up by the tenant in his plea in bar, and traversed by the avowant, who was under the necessity of deducing his title to the premises, in the avowry, and which he did, by alleging that the reversion descended to him from his father. In *Hargrave v. Shewin*, the tenant held the portion of the farm

(a) 5 Term Rep. 249.

(b) 4 Taunt. 320.

mentioned in the declaration at the whole rent to which each part of the land was liable, and therefore a distress for the whole might have been taken on any part. In *Forty v. Imber*, no question was raised as to the title of the avowant, but merely as to the *quantum* of rent due; and in *Harrison v. Barnby*, the avowant, on an avowry for half a year's rent, had judgment for a quarter only, which was due. In *Grills v. Mannell*, the question arose on a collateral issue, *vis.* whether the party was seised of the reversion in fee, or for life; and in *Page v. Chuck*, the tenant occupied all the house, with the exception of the shop and yard, which were in the occupation of other tenants under a separate demise. All these cases, therefore, are distinguishable from the present; and, although *Tate* might be entitled to recover from the plaintiff two-thirds of the rent due for the house in question, yet the defendant should have made cognizance for those two-thirds only; whereas, he has claimed the full rent due for the whole of the premises, to which *Tate*, by his own shewing, is not entitled.

Lord Chief Justice TINDAL.—We think that, in this case, a verdict must be entered for the plaintiff. The precise issue, which the defendant has failed to prove, is raised by the first plea in bar, in which the plaintiff has averred that he did not hold the premises as tenant to *William George Tate*, by virtue of the supposed demise, in manner and form as the defendant in his cognizance has alleged. Although it is true that the words, "*in manner and form*," do not embrace the whole of the defendant's allegations, yet, they have been always held to extend to the terms of the demise between the landlord and tenant. The case of *Brown v. Sayce* is a decisive authority on that point; and here there is a distinct allegation that the plaintiff held the house in which, &c., as tenant to *Tate*, at the yearly rent of 170*l*. The statute 11 *Geo. 2*, c. 19, was not intended

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to relieve a landlord or an avowant from stating truly, although generally, the contract between him and his tenant; but only to relieve him from the difficulty of setting out his title with that degree of precision which was required by the common law. If this case had occurred before the statute was passed, it would have been incumbent on the defendant to have shewn, that *Bradney*, at the time he granted the lease to the plaintiff, was seised, and also the quantity of estate of which he was seised; that he devised the property to three trustees; the conveyance to *William Tate* by two of them, by reason whereof the reversion descended to *William George Tate* as heir of *William*; and that the latter and the other remaining trustee, who had omitted to execute the deeds, were tenants in common; that *William Tate* took only two-thirds of the property; that rent was in arrear for those two-thirds; and that the defendant, as bailiff of *William George Tate*, distrained for it: but since the statute, a concise and more general mode of avowing is permitted. Still, however, the allegations essential to the contract between landlord and tenant, and under which the latter holds, must correspond with the fact; and he may take the same objections in his plea of *non tenuit*, under the words *modo et formā*, as he might have done before the statute was passed. The defendant has alleged that the plaintiff held the premises as tenant to *William George Tate*, at the yearly rent of 170*l.*, but that allegation he has failed to prove, as *Tate's* father took only two-thirds of the property, to which the cognizance should have been confined. If a second distress were made by the other trustee for his share of the rent, and another action of replevin brought, the judgment in this case could not be pleaded in bar, as the record does not disclose what the precise interest of the landlord was, or the true nature of his contract with the plaintiff as his tenant. There is, consequently, a variance between the contract as to the holding, as alleged in the cognizance, and that proved at the trial, as well as to the amount

of the rent due to *Tate*, he being only entitled to two-thirds, instead of the entire property; and, therefore, a verdict must be entered for the plaintiff, for the usual nominal damages.

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Mr. Justice PARK.—I am of the same opinion. The construction put by my Lord Chief Justice on the statute 11 *Geo. 2*, c. 19, appears to me to be most correct; for, although the landlord may now avow generally, yet, what he alleges in such avowry, he must allege truly. Here, the allegation, that the rent for the whole of the premises was due to *Tate*, was not proved. Although I was at first staggered with the case of *Page v. Chuck*, yet it now appears to me to bear no analogy to the present, as there the plaintiff occupied the whole of the house, with the exception of the shop and yard, which were let under a separate demise; and if a burglary had been committed, it would have been well laid to have been in the house of the plaintiff, as the tenant or occupier.

Mr. Justice BURROUGH.—If the cases before the statute 11 *Geo. 2* was passed be looked at, they shew, that it was incumbent on the party avowing or making cognizance, to set out his title to the premises, for the rent of which the distress was levied; but the statute has only made a difference in the form of pleading; and, although the landlord may now avow generally, he must prove his title to the rent in the terms in which he alleges it. Here, the defendant has alleged that the plaintiff held under *Tate*, as his landlord, at the yearly rent of 170*l.*, and that three quarters were due. In point of fact, *Tate* was only entitled to two-thirds of the property for which he has claimed rent from the plaintiff; whereas, he has alleged a title to all the rent, as though he had been possessed of the whole of the premises. There is, consequently, a variance between the cognizance and the deeds produced

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at the trial, by virtue of which the property was conveyed to *Tate's* father, and on which alone the distress could be supported. It therefore appears to me, that none of the cases which have been cited for the defendant have any application to the present.

Mr. Justice GASELEE.—The only difficulty I felt in the course of the argument, arose from the case of *Claworthy v. Mitchel*. But there the point turned on the particular form of the pleadings, and the issue raised thereon; for the defendant, in his avowry, alleged that his father was seised, and let for years rendering rent; that he died, and that the reversion descended to the avowant, and he avowed for rent in arrear. The plaintiff pleaded in bar, that the avowant's father devised the reversion to another;—and the avowant traversed the devise. No question, therefore, arose as to whether the premises descended to the avowant, but only as to the nature of the devise. Here, however, the defendant has not only alleged that the plaintiff held the premises at the yearly rent of 170*l.*, but that he held as tenant thereof to *Tate*, the party at whose instance the distress was levied, at that rent. But, it appeared by the deeds given in evidence, that the plaintiff did not hold the whole of the premises as tenant to *Tate*, at the rent of 170*l.*, but that he only held two-thirds as tenant to him, at the annual rent of 170*l.* for the whole. If we were to say that this cognizance was sufficient, a landlord need not in future set out in his avowry the terms of the contract under which his tenant holds, which is necessary, according to the case of *Brown v. Sayce*. As, therefore, *Tate* was only entitled to distrain for the rent due for two-thirds of the premises, the defendant should not have made cognizance for the whole. The rule, therefore, for entering a verdict for the plaintiff on the plea of *non tenuit* must be made

Absolute.

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Wednesday,
July 1st.

MILSOM v. DAY.

MR. Serjeant *Taddy*, on a former day in this Term, obtained a rule *nisi* for an attachment against a witness for not attending at the trial of this cause, to give evidence on behalf of the defendant, he having been duly served with a copy of a *subpœna* for that purpose. The motion was founded on an affidavit of the defendant's attorney, who stated, that, on the 1st of *February* last, he served the witness with a copy of a *subpœna*, to attend at the trial of this cause on the 13th, being the first day of the Sittings at *Westminster* after the last *Hilary* Term, and that the usual conduct money was tendered to, and accepted by, the witness. That the cause came on for trial on the 17th *February*, when the witness was called thrice on his *subpœna*, but that he did not appear; that he was a most material and important witness for the defendant, to prove the delivery and contents of a bill of parcels to the plaintiff; and that a verdict was given in favour of the latter, in consequence of the absence of such witness.

In order to bring a party into contempt, for not attending at a trial as a witness at the Sittings, in obedience to a *subpœna*, the writ must specify the place at which the cause is to be tried, viz. *Westminster Hall*, or *Guildhall*.

Mr. Serjeant *Wilde* now shewed cause, and produced the copy of the *subpœna* with which the witness was served:—by which he was commanded to appear before Sir *Wm. Draper Best*, Knight, our Chief Justice of the Bench, on *Friday*, the 13th *February* instant, by nine o'clock in the forenoon, to testify, &c., in a certain cause then depending in our Court before our Justices at *Westminster*, between the plaintiff and defendant, on the part of the defendant, &c. &c.—The learned Serjeant submitted, that the *subpœna* was defective in point of form, as it should have stated, that the cause was to be tried at *Westminster Hall*(a). He also produced an affidavit of the witness, which stated that he attended at *Westminster* on

(a) See Tidd's Practical Forms, to 9th Edit. of Practice, p. 289.

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the 13th and 14th of *February*; that the cause was not set down in the paper for either of those days; that he inquired for the defendant's attorney, but could not find him; and that the witness did not mean to disobey or be guilty of a contempt of the process of the Court.

Per Curiam.—A *subpœna*, in order to bring a party into contempt for non-attendance under it, should follow the prescribed form, and the place where the cause is intended to be tried, (if at the Sittings in *Westminster* or *London*), must be inserted in the body of it. As that was not done in this case, it is too much to say, that the party is liable to an attachment; and he has sufficiently shewn us that he did not intend to disobey the order of the Court.

Rule discharged with costs.

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DAY v. STEWART.

In an action by the indorsee against the drawer of a bill of exchange, it is no defence that the bill was drawn and accepted upon an illegal stock-jobbing transaction, if the indorsee received the bill from a third person for a valuable consideration, and without notice of the circumstances under which it was given. Differences in consols do not necessarily apply to time bargains, but may refer to a *bond fide* sale and delivery of stock.

THIS was an action of *assumpsit* by the plaintiff as the indorsee and holder, against the defendant as drawer and indorser of a bill of exchange for 311*l.* 17*s.* 6*d.* On the production of the bill at the trial, before Lord Chief Justice *Tindal*, at *Westminster*, at the first Sittings in this Term, it appeared to have been drawn by the defendant upon, and accepted by, one *Watson*, and indorsed by the defendant to a third person, who indorsed it to others, who indorsed it to the plaintiff's uncle, who gave it to the plaintiff.

The handwriting of the defendant having been proved, the plaintiff called a witness to shew that the bill was given to him by his uncle *bond fide*, and for a valuable consideration; the defence being, that it was drawn and accepted for the amount of differences on time bargains in the funds; and that, it being a stock-jobbing trans-

action, the bill was void, as falling within the provisions of the statute 7 *Geo. 2*, c. 8; and that the plaintiff was aware of the circumstances under which the bill was made, he having been informed of it by his uncle when he received it. The defendant's clerk was called, who stated that he was present when the bargain was made between the defendant and the acceptor, and for which the bill in question was drawn, and that the transaction was entered in a book. On the production of the book, it contained mere entries of an account, in figures, between the defendant and *Watson*, but the amount was not added up, nor was a balance struck. A ledger of *Watson*, the acceptor, was then put in, containing an entry made by him, and signed with his initials, and which was as follows:—"To differences in consols, 311*l.* 17*s.* 6*d.*" being the amount of the bill in question.

A witness was then called for the defendant, to explain the meaning of the word *differences*, and, on looking at the entry in the acceptor's book, he stated that he believed it related to time bargains; and that *differences* generally applied to bargains of that nature. But no satisfactory evidence was adduced to shew, that the plaintiff was aware of the consideration for which the bill was drawn and accepted; and the Lord Chief Justice left it to the Jury to say, whether the parties, at the time the bill was made, meant differences in point of time, or time bargains, as they are usually termed, and which are illegal, by the provisions of the statute 7 *Geo. 2*, c. 8;—or differences between consols *bond fide* and actually bought, sold, and delivered, which would be a valid and legal transaction.

The Jury found a verdict for the plaintiff for the amount of the bill.

Mr. Serjeant *Taddy* now applied for a rule *nisi*, that this verdict might be set aside and a new trial granted, on the ground that the entry in the acceptor's book was con-

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clusive to shew that the consideration for the bill, as between the drawer and the acceptor, was for differences arising on time bargains in consols, and that it was therefore absolutely void by the statute 7 *Geo. 2*, c. 8, s. 5 (a); and although such differences might not, in strictness, have reference to bargains for time, yet, that they fell within the meaning of the statute, which was passed for preventing the practice of compounding or making up differences for stocks not actually delivered. The proper question for the Jury, therefore, was, whether "the differences in consols" related to stock bought and sold, and actually delivered, and not whether they were meant to apply to time bargains; for whenever differences are paid, it must be considered as a stock-jobbing transaction. Although in *Edwards v. Dick* (b), in an action against the drawer of a bill, it was held to be no defence that it was drawn and accepted upon an illegal consideration, if it were indorsed over by the drawer for a valuable consideration to a third person, who sued upon it; and here, there was no direct evidence that the plaintiff knew the consideration for which the bill was drawn and accepted; yet, there the bill was accepted for a gaming debt, and the defendant, as drawer, was not within the spirit of the statute against gaming. But, in

(a) By which it is enacted, that no money or other consideration whatsoever shall, after the passing of the act (made perpetual by 10 *Geo. 2*, c. 8), be voluntarily given, paid, had, or received, for the compounding, satisfying, or making up any difference for the not delivering, transferring, having, or receiving any public or joint stock, or other public securities, or for the not performing of any contract or agreement so stipulated and agreed to be performed;—but that all and

every such contract and agreement shall be specifically performed and executed on all sides, and the stock or security thereby agreed to be assigned, transferred, or delivered, shall be actually so done, and the money, or other consideration thereby agreed to be given and paid for the same, shall also be actually and really given and paid; and all persons who shall voluntarily compound such difference, shall forfeit one hundred pounds.

(b) 4 *Barn. & Ald.* 212.

Steers v. Lashley (a), where a bill was given in respect of a stock-jobbing transaction, it was held to be invalid in the hands of an indorsee, although he was a *bonâ fide* holder.

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Lord Chief Justice TINDAL.—I am not aware, that, if this cause were to be re-tried, a different direction could be given to the Jury, although the mode in which I left the question to them at *Nisi Prius* has been objected to. The case of *Edwards v. Dick* did not then occur to me; if it had, I should have expressed myself more unfavourably towards the defendant than I did. Mr. Justice Holroyd there said (b),—"No doubt, the acceptance is void; for it was given in consideration of money lost at play. But the consideration given by the present plaintiff, when the bill was negotiated, was not of that description; and I think the object of the statute will be best answered in the present case, by holding, that the words extend only to make the acceptance void." There, as here, the action was against the drawer of the bill, and, as it was indorsed by him, and afterwards came to the plaintiff for a valuable consideration, the defendant, by his indorsement, affirmed it to be free from exception; and he could not afterwards set up his own misconduct to bar the honest claim of an innocent indorsee. Besides, in this case there was no satisfactory evidence to shew that the plaintiff was aware of the circumstances or consideration for which the bill was drawn and accepted, as in *Steers v. Lashley*; and, if we were to grant a new trial, it would be incumbent on the defendant to prove that the plaintiff knew, or had notice, of the transaction between the drawer and the acceptor. The defendant had the benefit of the testimony of the witness, who stated, that the word '*differences*' general-

(a) 6 Term Rep. 61; S. C. 1 Esp. Rep. 166.

(b) 4 Barn. & Ald. 216.

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ly applied to time bargains, which is clearly an illegal transaction; and I so told the Jury. But I am not prepared to say, that differences must, *ex vi termini*, be taken to mean illegal differences. 'Differences in consols' may apply to reckonings on an actual sale and delivery of stock of that description; and, as it does not appear to me that the result of a second trial would be more favourable to the defendant, I think we ought not to yield to this application.

Mr. Justice PARK.—I am of opinion that the question in this case was most properly left to the Jury by my Lord Chief Justice. 'Differences in consols' do not necessarily imply differences on time bargains; they might equally relate to stock *bonâ fide* sold and delivered, as the price frequently fluctuates very considerably in the course of one day.

Mr. Justice BURROUGH, and Mr. Justice GASELEE concurring—

Rule refused (a).

(a) In *Greenland v. Dyer*, 2 Man. & Ryl. 422, it was decided, that a bill accepted for differences on time bargains in stock, was valid in the hands of an indorsee, without notice of the consideration for which the bill was given.

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ADAMS and two Others v. BATESON.

THIS was an action of debt on bond. The declaration stated, that the defendant, on the 27th *December*, 1824, at *London*, by a certain writing obligatory, sealed with his seal, and now shewn to the Court, acknowledged himself to be held and firmly bound to the plaintiffs, therein described as three of the trustees of the British Commercial Insurance Company, in the penal sum of 2,000*l.*, to be paid to the plaintiffs, trustees as aforesaid;—which said writing obligatory was and is subject to a certain condition thereunder written, to wit, that if the defendant, and *William Lucas Reay*, and *Thomas Robinson*, any or either of them, or any or either of their heirs, &c., should and did well and truly pay or cause to be paid unto the said plaintiffs, trustees as aforesaid, their executors, &c., the full sum of 1,000*l.*, together with interest for the same, at the rate of five pounds *per cent. per annum*, on the several days and times, and in manner thereafter mentioned (a), then the bond was to be void, else to remain in full force and virtue. The plaintiffs then averred, that after the making of the bond, to wit, on the 30th *June*, 1828, the sum of 750*l.* of the said principal of 1,000*l.* and interest, being seven of the instalments of 100*l.* each, with interest, was due and owing from, and payable by the defendant, and *William Lucas Reay*, and *Thomas Robinson*, to the plaintiffs, and still is in arrear and unpaid;—by reason of which, the said writing obligatory became forfeited, and whereby an action hath accrued to the plaintiffs to demand from the defendant the said sum of

In debt on a joint and several bond, the obligees declared against one of three obligors, and set out the condition in the declaration to be for payment by the defendant, C., and D., any, or either of them. *Plea—non est factum.* On the production of the bond, it was conditioned for payment by the defendant, C., and E.; and it appeared that, after its execution by the defendant, the name of E. was substituted for that of D., at the request of the party to whom the money for which the bond was given was advanced, and with the assent of the plaintiffs (the obligees), but without the knowledge or assent of the defendant:—*Held*, that this was a fatal variance, and avoided the bond as against the defendant, although he afterwards assented to the alteration, and paid some instalments due on the bond.

(a) The sum of 1,000*l.* was to be repaid to the plaintiffs, by half-yearly instalments of 100*l.* each, the last to be made within five years after the execution of the bond.

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2,000*l.* Breach—Non-payment of that sum. Plea—*Non est factum*. On which issue was joined.

At the trial, before Lord Chief Justice *Best*, at *Guild-hall*, at the Sittings after the last *Michaelmas* Term, the Jury found a special verdict in substance as follows:—

That the bond was executed by the defendant on the 27th *December*, 1824.

The bond given in evidence was then set out, and by which the defendant *James Bateson*, of *Liverpool*, in the county of *Lancaster*, broker; *William Lucas Reay*, of *Liverpool*, aforesaid, surveyor; and *John Hall*, of *Lancaster*, in the said county, spirit-merchant; were bound to the plaintiffs in the penal sum of 2,000*l.*; and the condition was for the payment of 1,000*l.*, by half-yearly instalments of 100*l.* each, by the defendant, and *Reay*, and *Hall*; and the bond was executed by the defendant and *Reay*, and one *Thomas Robinson*. That the bond and condition, after the making, sealing, and delivery thereof by the defendant, were, by the direction of one *Machell*, the borrower of the said sum of 1,000*l.* in the condition mentioned, and for the payment whereof the bond was made and executed, altered and varied in this: that the words following, to wit, *John Hall*, of *Lancaster*, spirit-merchant, were erased out of the bond, and the words following, to wit, *Thomas Robinson*, of *Liverpool*, ship-broker and merchant, were substituted in lieu thereof; and also, that the words following, to wit, *John Hall*, were erased out of the condition of the bond, and the words following, to wit, *Thomas Robinson*, were substituted in lieu thereof; to which said alterations the plaintiffs assented, previously to the alterations, or any of them, being made. That the bond, subject to the condition so altered, as aforesaid, was thereupon signed, sealed, and delivered by the said *Thomas Robinson*, who was another and a different person from the said *John Hall*; and that the bond and condition so

altered and varied as aforesaid, are the same bond and condition by the plaintiffs in their declaration mentioned. That the aforesaid substitution of the name of the said *Thomas Robinson* for that of the said *John Hall*, in the bond and the condition thereof, was made without the assent, knowledge, permission, or authority of the defendant, and that he had never re-executed the bond.—That the defendant, since the making of the said alteration in the bond and condition, and with full knowledge thereof, had assented thereto, by acknowledging his liability to pay the said sum of 1,000*l.*, with interest, as in the condition mentioned, and also by the payment of certain of the instalments. But whether, &c.;—and if, upon the whole matter it should seem to the Court, that the bond was the deed of the defendant, the Jury found for the plaintiffs, damages, 658*l.* 18*s.* 8*d.*; but, if the Court should deem the bond not to be the deed of the defendant, then they found for him.

The case came on for argument in the course of the last Term, when Mr. Serjeant *Taddy*, for the plaintiffs, submitted, *first*, that the alteration in the bond and condition, by substituting the name of *Thomas Robinson* for *John Hall*, was not material; and *secondly*, that if it were, the defendant had assented to the alteration, not only by acknowledging his liability to pay the sum secured by the bond, but by the actual payment of some of the instalments. *Hall* never executed the bond; he, therefore, was not a joint obligor; and the mere substitution of the name of another person in his stead, does not discharge the other obligors who executed the bond. Besides, this is a several and not a joint bond; and the plaintiffs, by suing the defendant alone, have treated it as his separate bond; and he alone is charged in the declaration. As far, therefore, as regards the defendant, it is immaterial whether *Hall* executed the bond or not; and the Court cannot go into the equity of the case, but must consider the instrument as

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if it were the bond of the defendant alone; and his liability could not be affected by the substitution of one of two several co-obligors for another. All the authorities, by which alterations in deeds may have the effect of vitiating or destroying them, were brought before the Court in the late case of *Hudson v. Revett* (a); and it was there held, that a deed of trust was valid, although, at the time it was executed by the defendant, a blank was left in it for the amount of a sum due to the creditor at whose suit the defendant was in custody, which amount being ascertained on a subsequent day, the blank was filled up, with the defendant's assent. So, here, the defendant has assented to the alteration, by acknowledging his liability, and paying some of the instalments. Although, in *Bul-ler's Nisi Prius* (b), it is said, that if there be blanks left in an obligation in places material, and filled up afterwards by assent of parties, yet is the obligation void, for it is not the same contract that was sealed and delivered:—as if a bond were made to C., with a blank left for his christian name, and for his addition, which is afterwards filled up:—yet the true distinction is taken in *Rolle's Abridgment* (c), viz. that if a deed be altered in a point material, by the plaintiff himself, or by a stranger, without the privity of the obligee, the deed becomes void, for it is not the same deed; but that if the deed be interlined in a thing not material by a stranger, without the assent of the obligee, this shall not make the obligation void: and here, the alteration was made by the direction of the person who borrowed the money, and who was no party to the bond. It appears from the report of *Zouch v. Clay*, in *Ventris* (d), that the bond declared on was a joint and several bond; and although there was a space left for the

(a) 2 Moore & Payne, 663; S.
 C. 5 Bing. 368.
 (b) 7th Edit. by Bridgman, 267.

(c) Vol. 2, 29, pl. 23.
 (d) Vol. 1, 185.

name of the co-obligor, which was inserted after the bond was executed by the defendant; yet the Court held that the bond remained the same as to him, and that he could not take advantage of it. In *Markham v. Gonaston*, as reported in *Moore* (a), the plaintiff having replied to a special plea by the defendant, that the blanks in the bond were filled up with the assent of the obligor, was held to be sufficient to entitle the plaintiff to judgment. In *Dodd. Lewis v. Bingham* (b), where there were several blanks left in a mortgage deed at the time of its execution by the mortgagee, as to sums to be received by the mortgagor from the grantees of an annuity, and interlineations were made after the execution by the mortgagee, it was held, that the deed was not therefore void. In *Waugh v. Bussell* (c), where a word was inserted in a bond by a stranger, after it was executed by the obligor, without his assent, or with the knowledge of the obligee, it was held not to destroy the bond; and here, *Machell*, the borrower, must be considered as a stranger to the instrument. As, therefore, the bond must be taken as the separate bond of the defendant, his liability continued the same, although the name of *Robinson* was substituted for that of *Hall*, and consequently the variance between the bond declared on and that produced in evidence, is immaterial. But even if it were not so, the defendant, with full knowledge of the alteration, has expressly assented to it; and, by the payment of the instalments, it must be now assumed that he had taken the benefit of the bond, and if so, he must bear the burden imposed by it; and such assent amounts to an *ex post facto* ratification of the instrument. Although it may be said, that as the bond was under seal, a subsequent ratification or assent by parol may not be sufficient to restore its validity; yet, it is laid down by *Littleton* (d), that

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(a) 517.

(b) 4 Barn. & Ald. 672.

(c) 5 Taunt. 707.

(d) Lit. s. 374, Co. Lit. 230 b.

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if an estate be made by indenture to one for life, remainder to another in fee, upon a certain condition, and if the tenant for life have put his seal to part of the indenture, and afterwards dies, and he in the remainder enters into the land by force of his remainder, he is bound to perform all the conditions comprised in the indenture, as the tenant for life ought to have done in his life-time, though he in remainder never sealed any part of the indenture; inasmuch as he entered and agreed to have the land by force of the indenture, he is bound to perform the conditions within it, if he will have the land. So, where three were enfeoffed by deed, and there were several covenants in the deed on the part of the feoffees, and only two of them sealed the deed, and the third entered and agreed to the estate conveyed by the deed, it was held that he was bound in a writ of covenant, by the sealing of his companions. *Brett v. Cumberland* (a).

Mr. Serjeant *Stephen, contra.*—*First*, the bond is void: the alteration, by substituting the name of *Robinson* for *Hall*, having been made after its execution by the defendant, and without his knowledge or assent. *Secondly*, if not, the defendant is entitled to judgment, on the ground of a variance between the condition of the bond as set out in the declaration, and that produced in evidence at the trial. The plaintiffs have declared against the defendant on a bond, subject to a condition for payment of a certain sum of money by him, *Reay*, and *Robinson*, and when the defendant executed the bond, it was conditioned for payment by himself, *Reay*, and *Hall*. He therefore never executed such a bond as that declared on, as the instrument produced was executed by the defendant, and *Reay*, and *Robinson*. Besides, the plaintiffs have not treated it as the single bond of the defendant, although

(a) 2 Rolle's Rep. 63.

they have declared against him alone, for they have set out the condition in the declaration, and alleged, that if the defendant, *Reay*, and *Robinson*, any or either of them, should pay the plaintiffs, the bond was to be void; and *Robinson* was not a party to the bond, nor was his name inserted therein at the time of its execution by the defendant. The plea of *non est factum* was therefore an answer to the action, as the bond given in evidence was not the deed of the defendant at the time he executed it, as the name of *Robinson* did not appear therein. In *Powell v. Duff* (a), where the condition of a bail-bond was filled up after the defendant had executed it, it was held to be void; and Lord *Ellenborough* said—“The defendant never did execute a bond with such a condition—the condition is set out in the declaration as part of the instrument.” Although, there, the condition was necessarily set out, to enable the plaintiff to sue as assignee of the Sheriff; yet here, as the plaintiffs have elected to set out the condition in the declaration, they must be bound by it; and it was incumbent on them to have shewn that it corresponded with the terms of the bond, at the time the defendant executed it; and his subsequent assent to the alteration cannot have the effect of re-modelling the bond; and although he may have acknowledged his liability by an act *in pais*, yet the Jury found that he had never re-executed the bond. But, whether the alteration were made in a material part of the bond or not, it avoided the instrument altogether, according to the doctrine laid down in *Pigot's* case (b), because it was made with the privity of the obligees, but without the assent or knowledge of the obligor; and the instance put by Lord *Coke* is, as if a bond be made to the Sheriff for appearance, and the Sheriff's name is omitted in the bond, and after the delivery thereof his name is in-

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(a) 3 Camp. 181.

(b) 11 Rep. 27 a.

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terlined either by the obligee or a stranger, without the privity of the Sheriff, the deed is void. Although it may be said that the borrower of the money was a stranger to the bond, yet he was not a stranger in interest, as he was connected with the obligees, who assented to the alteration. In an *Anonymous* case (a), it was held, that if a bond be interlined in a material part, with the privity of the plaintiff, but without the assent of the obligor, the bond is void. There, too, the defendant pleaded *non est factum*, and the Jury found a special verdict, that the bond was interlined after its execution by the defendant. But the case of *Baylis v. Dineley* (b), is an express authority to shew, that a subsequent assent or confirmation by parol is not sufficient to confirm an instrument under seal, which was originally void. There, a bond was given by an infant; and on a replication to a plea of infancy, that he ratified and confirmed the bond after he attained his full age, Lord *Ellenborough* said—"Unless there be something amounting to an estoppel in law, of as high authority as the deed itself, we cannot surrender the interests of the infant into such hands as he may chance to get." But the materiality of the alteration in this case does not altogether depend upon the consequences to the obligor, but upon the part of the instrument in which it occurred; and the substitution of one party for another in the condition of a bond is most material, as it is the essential part of the obligation. The defendant might have consented to join in the bond with *Hall*, as he might be a more opulent man than *Robinson*, or might have been connected with the defendant by relationship: and although *Hall* did not execute the bond, he might have paid its amount, or contributed towards it, if called upon to do so by the plaintiffs; and when the defendant executed the bond, he contemplated that *Hall* would be a co-

(a) Moore, 835.

(b) 3 Mau. & Selw. 477.

surety, and which might have induced him to sign it. Whether, therefore, the alteration renders the bond void or not, yet the condition is not set out in terms in the declaration, as one of the persons therein named was no party to the bond at the time it was executed by the defendant, nor did he afterwards assent to the substitution of another person in his stead.

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Mr. Serjeant *Taddy* in reply.—The bond in question being a joint and several bond, and conditioned for the payment of a certain sum by instalments, falls within the provisions of the statute 8 & 9 *Wm.* 3, c. 11, s. 8, and Mr. Serjeant *Williams* observed in a note to *Roberts v. Marriott* (a):—"Perhaps, in all cases of actions of debt on bond, conditioned for the doing of any thing else but the payment of a gross sum of money, the best way is to state the whole in the declaration;"—and this being a joint and several bond, the plaintiffs had their election to sue all or each of the obligors separately; and as they sued the defendant alone, they treated it as a several bond; and therefore the effect of the condition, as far as regards this action, must be considered as a condition for payment by the defendant alone, independently of the two other obligors named in the bond, and therefore the substitution of the name of another, for one of the obligors originally named, cannot have the effect of avoiding the bond as against the defendant. If the obligee of a joint and several bond elect to proceed upon it as a joint bond, there is no difference between suing two only of three joint obligors, and one only of two joint obligors, for, in either case, advantage can only be taken of the omission by a plea in abatement; and, according to *Zouch v. Clay*, the insertion of the name of a joint obligor after the bond was executed by the other, was held not to avoid the instrument as

(a) 2 *Wms. Saund.* 4th Edit. 187, n. 2.

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to the latter, but that the bond remained the same as to him. In *Fenner v. Broomsby*, which was tried before Mr. Baron *Hullock*, at *York*, at the Summer Assizes, 1827, and was an action against three defendants on a bail bond, two of whom had suffered judgment by default, and the one who defended the action proved that the date had been altered after he had signed the bond, and that he had not re-executed it: that learned Judge held the alteration to be immaterial. In *Powell v. Duff*, the condition was necessarily set out in the declaration, or the plaintiff could not have sued as assignee of the Sheriff. In *Waugh v. Bussell*, the word "*hundred*" was accidentally omitted, and its insertion did not alter the sense of the instrument, and supplied nothing but what could be understood before it was introduced. *Baylis v. Dineley* was a peculiar case, and turned on the question, whether an instrument under seal, made by an infant, might be avoided by parol after he came of age. Here, however, as the name of *Robinson* was substituted for that of *Hall*, at the instance of the borrower of the money, he must be considered as a stranger, he not being connected with either of the parties to the bond; and as *Hall* had not executed it, he could never be called upon by the plaintiffs for payment.

Cur. adv. vult.

Mr. Justice PARK (a), after reading the declaration and special verdict, as set forth above, now delivered the judgment of the Court as follows:—

Two points have been raised on the part of the defendant:—*First*, that the bond in question is void in law by the alteration made after its execution by the defendant. And *secondly*, that if it be not void, the condition is erro-

(a) Lord Chief Justice Best when this case was argued in the
 was attending the Privy Council last Term.

neously set out in the declaration, as the bond was there stated to be conditioned for payment by the defendant, and *Reay*, and *Robinson*, and the bond, when executed by the defendant, was conditioned for payment by him, and *Reay*, and *Hall*. There is, consequently, a material variance between the condition as set out in the declaration, and the bond given in evidence at the trial. It might have been necessary for us to consider whether the alteration rendered the bond void, if the plaintiffs had adopted another mode of pleading, *vis.* by treating the bond as a common money bond, and not setting out the condition in the declaration. But my brother *Burrough*, my brother *Gaselec*, and myself, are all of opinion that the second objection is well founded. It is, therefore, unnecessary for us to decide the first. The declaration states the condition to be, that if the defendant, *Reay*, and *Robinson*, any or either of them, should pay the plaintiffs the sum of 1,000*l.*, in the manner therein mentioned, the bond should be void. The defendant has pleaded that the bond is not his deed; and on its production at the trial, it appeared to have been conditioned for payment by the defendant, *Reay*, and *Hall*, at the time it was executed by the defendant. The bond, therefore, so far from being a bond conditioned for payment by the three persons named in the declaration, is a bond for payment by three, one of whom is not named in the declaration. This appears to us to constitute a material variance, and there must consequently be—

Judgment for the defendant.

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WILLANS v. TAYLOR.

In an action on the case, for maliciously indicting the plaintiff for perjury, malice and a want of probable cause in the defendant must concur; and the plaintiff must adduce some evidence to shew a want of probable cause, before he can call upon the defendant to prove the affirmative, and shew, that he had reasonable and probable cause. Where, therefore, the defendant indicted the plaintiff for perjury, but, as he did not appear before the Grand Jury, the bill was ignored, and he afterwards preferred another indictment, and the bill was found on his testimony, and on which he caused the plaintiff to be apprehended, and opposed his bail, and suspended all proceedings on the indictment for three years, and the plaintiff took the record down to trial, at which the defendant was present, but left the Court just before he was called as a witness for the prosecution; and the Jury, after deliberation, acquitted the plaintiff:—*Held*, that this was sufficient *prima facie* evidence of a want of probable cause; but the Judge having thought otherwise, and directed a nonsuit—the Court set it aside, and ordered a new trial.

A short-hand writer having been allowed to refer to his notes, as to the testimony of witnesses at the trial of the indictment:—*Held*, that such evidence was improperly received, as the witnesses themselves ought to have been called.

THIS was an action on the case, and brought against the defendant for having maliciously, and without any reasonable or probable cause, indicted the plaintiff for perjury.

At the trial, before Lord *Wynford*, at *Westminster*, at the Sittings after the last Term, it appeared, that the plaintiff had sued the defendant in debt, under the statute 9 *Anne*, c. 14, s. 2, for money lost at play, and in which action the plaintiff recovered a verdict for treble the amount of the sum lost (a). That, on the trial of that action, the plaintiff deposed (among other things), that the defendant kept a gaming-house in *Pall Mall*, at which the game of *Rouge et Noir* was constantly played; that the plaintiff was in the habit of frequenting the house during the months of *March*, *April*, and *May*, 1822; and that he lost there, at that game, at seventeen different times during those months, various sums of money; and he also swore, that he had played there, and lost money to the defendant on *Good Friday*, in that year.

In *January*, 1824, the defendant preferred a bill of indictment against the plaintiff for perjury in that suit, which was ignored at the ensuing *Westminster* Sessions, in *February*, as the defendant neither appeared nor adduced any evidence before the Grand Jury, nor was his name indorsed as a witness on the back of the bill. In the month of *April* following, the defendant preferred ano-

(a) See *Taylor v. Willans*, (in error), 11 B. Moore, 448.

ther indictment, and, at the next *Westminster* Sessions, in *May*, 1824, a true bill was found on the testimony of the defendant, corroborated by one other witness. The defendant then caused a warrant to be issued for the apprehension of the plaintiff, and, by various misrepresentations, intimidated persons from becoming bail for him; and he was, in consequence, imprisoned eleven days before he could procure bail. The plaintiff was prepared to meet the charge at the Sessions, but the defendant, in *Easter Term* preceeding, removed the indictment by *certiorari* to the Court of *King's Bench*, and, on the 7th *July*, he procured an affidavit to be sworn before a Judge of that Court, for the apprehension of the plaintiff, but the deponent omitted to state that the plaintiff had before procured bail on the same charge; and it was also sworn, that the defendant did not know where the plaintiff resided, and that the defendant believed he had gone out of the way to avoid the proceedings under the indictment, which, in point of fact, was untrue. A Judge's warrant for the plaintiff's arrest was accordingly issued, by the terms of which he was to be brought before one of the Judges of the *King's Bench*, if in town, if not, before one of the police magistrates. The plaintiff immediately went to *Bow-street*, and tendered bail, which were opposed on the part of the defendant, and the plaintiff was, consequently, imprisoned and detained for forty days, at the expiration of which time the *Old Bailey* Sessions commenced. The plaintiff then procured bail, but no further proceedings were taken by the defendant on the indictment for three years. In *Easter Term*, 1827, the plaintiff took down the record to *Westminster*, for trial; and although the defendant was in Court at the commencement, yet, when he was called on as a witness, he did not appear, and the Jury, after deliberating about half an hour, acquitted the plaintiff; the assignments of perjury being, that he had falsely sworn that he had lost money

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at the defendant's house, at seventeen different times, in the months of *March, April, and May, 1822*; and that he had played there on *Good Friday* in that year. The plaintiff afterwards commenced the present action against the defendant, who called witnesses to shew, that his house was always shut up on a *Good Friday*. The plaintiff, among other witnesses, called Mr. *Gurney*, the short-hand writer, for the purpose of shewing that the defendant was in Court at the trial of the indictment, and that he did not appear as a witness when called on for the prosecution; but, as Mr. *Gurney* said, he could not recollect whether the defendant had been called or not, he was requested by the plaintiff's counsel to look at his notes of the trial. But it did not appear from them that the defendant had been in Court, or that he had been called as a witness. The defendant's counsel then cross-examined Mr. *Gurney*, and requested him to refer to his notes, to shew that three witnesses had sworn, on the trial of the indictment, that the defendant's house had never been open for play on a *Good Friday*. For the plaintiff, it was objected, that this evidence was not admissible, as the witnesses themselves ought to be called. His Lordship said, that he considered the objection to be well founded, and that the short-hand writer's notes had not the least weight with him; but he thought, that, under the circumstances, the plaintiff had not adduced sufficient evidence, to shew that the defendant had preferred the indictments against him without reasonable or probable cause, and he accordingly directed a nonsuit.

Mr. Serjeant *Cross*, on a former day in this Term, obtained a rule *nisi*, that this nonsuit might be set aside, and a new trial granted, on the grounds, *First*, that the plaintiff had adduced sufficient evidence to call on the defendant to shew that he had a probable cause for the prosecution; and, *Secondly*, that the short-hand writer's notes, as to what

the witnesses for the defendant deposed on the trial of the indictment, ought not to have been referred to, as the witnesses themselves ought to have been called. As to what shall amount to a want of probable cause, in an action of this nature, is a mixed question of law and of fact, and inferences of the intention of the prosecutor may be drawn from extraneous circumstances, *vis.* from his own conduct, as well as that of his coadjutors; and the plaintiff having proved, that the first bill of indictment was ignored, that the second was found on the testimony of the defendant, that he harassed the plaintiff in opposing his bail, and that he delayed prosecuting the last indictment for three years, and compelled the plaintiff to take down the record to trial, in order to rid himself of the imputation with which he was charged, and the defendant's absenting himself at the time he was called on to substantiate such charge, were abundant evidence of a want of probable cause;—at all events, those facts should have been submitted to the consideration of the Jury; and if they found that they were true in substance, then it was for the Judge to decide, whether they amounted to a probable cause for the defendant's prosecuting the indictments against the plaintiff, or not.

Mr. Serjeant *Taddy*, and Mr. Serjeant *Wilde*, now shewed cause.—As Mr. *Gurney* had no means of recollecting whether the defendant was in Court, or called as a witness at the trial of the indictment, but through the medium of his notes, and the plaintiff called on him to prove that fact, although he failed to do so, the defendant had afterwards a right to make what use of the notes he pleased, as the whole of them might be considered as evidence of what took place on the trial of the indictment, which formed a part of the transaction. The main question, however, is, whether the plaintiff, at the trial of this cause, in which he charged the defendant with

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having maliciously indicted him, produced sufficient evidence to shew, that the latter was actuated by malice, or to call on him to prove that he had a reasonable or probable cause for preferring the indictments; and the Lord Chief Justice was clearly of opinion, that the plaintiff had not shewn that the defendant had acted without probable cause, and, accordingly, directed a nonsuit. In order to sustain the action, it was incumbent on the plaintiff to shew malice, either express or implied, in the defendant, and also, that he had proceeded without any probable cause; and, even if the plaintiff had proved malice, if the defendant shewed that he had a probable cause, he was entitled to a verdict. In the *first* place, the plaintiff should have offered some evidence of the want of probable cause, before he could call on the defendant to justify his conduct. *Secondly*, the mere circumstance of an acquittal, under an indictment for perjury, is not sufficient evidence of malice, or a want of probable cause for preferring the charge. And *lastly*, the absence of the prosecutor at the trial of the indictment, or not offering himself as a witness on the part of the prosecution, cannot raise an inference of a want of probable cause.

The principles on which an action for a malicious prosecution are founded, are clearly laid down in the case of *Johnstone v. Sutton*, in error (a), the essential ground being, that a legal prosecution has been carried on *without a probable cause*; and although, from the want of probable cause, malice may be, and most commonly is, implied, yet, from the most express malice, the want of probable cause cannot be implied, and both are essential to support the action; and it is for the Jury to find the facts which are evidence of probable cause; and the Judge afterwards determines whether those facts so found amount to a probable cause or not. Here, the *onus* of ne-

(a) 1 Term Rep. 544-5.

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gating the presumption that the defendant carried on the prosecution without probable cause, lay on the plaintiff; and positive evidence of the want must be given in the absence of probable cause. In *Incedon v. Berry* (a), where the plaintiff gave in evidence some expressions of the defendant, indicative of express malice against the plaintiff in the course of the prosecution, and then closed his case;—Mr. Justice *Le Blanc* required him to go further, and negative the existence of probable cause, and ruled, that some evidence, (although slight evidence would be sufficient), must be given *on the part of the plaintiff*, of want of probable cause, before the defendant could be called upon for his defence. In *Wallis v. Alpine* (b), Lord *Ellenborough* held, that the omission to prefer an indictment, after a charge on oath for an assault, was not sufficient to excuse the plaintiff from proving the want of probable cause by the defendant. In *Purcell v. Macnamara* (c), it was decided, that the plaintiff must give evidence of malice in the defendant, shewing plainly the want of probable cause; and that malice is not to be implied from the mere proof of the plaintiff's acquittal, *for want of the prosecutor's appearing when called on* at the trial of the indictment. Here, the only evidence of a want of probable cause was the opposition offered by the defendant to the plaintiff's bail; but he should have shewn that they were opposed from malicious motives, or without cause, and they might have been incompetent or insolvent. In *Smith v. Macdonald* (d), where the defendant indicted the plaintiff for felony, and the Jury paused some time before they acquitted him, Lord *Kenyon* deemed it to be evidence of probable cause, and said, that "a person might be acquitted, though the prosecutor had the best grounds for the prosecution he had instituted;" and

(a) 1 Camp. 203, n.; S. C. Selw. Ni. Pri. 3rd Edit. 946.

(b) 1 Camp. 204, n.

(c) 9 East, 361; S. C. 1 Camp. 199.

(d) 3 Esp. Rep. 7.

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here the Jury deliberated for half an hour before they acquitted the plaintiff. In the late case of *Davis v. Hardy* (a), on the trial of an action for maliciously indicting the plaintiff without probable cause, the plaintiff proved a case, which, in the opinion of the Judge, shewed that there was no probable cause for preferring the indictment. The defendant then called a witness to prove an additional fact, which, on being proved, the Judge thought that there was probable cause; and the Court held, that there being no contradictory testimony as to that fact, and nothing to impeach the credit of the witness who proved it, the Judge was not bound to leave it to the Jury to find the fact, but that he might act upon it as a fact proved, and nonsuit the plaintiff. In *Savil v. Roberts* (b), it was decided, that if an indictment be found by the Grand Jury, the defendant shall not be compelled to shew a probable cause, but that the plaintiff must prove express malice; and in *Byne v. Moore*, the Court said (c), that that case had been often cited; and they refused to set aside a nonsuit in an action for maliciously indicting the plaintiff for an assault, on his proving that the bill returned was not found. In *Arbuckle v. Taylor*, Lord Eldon said (d)—“I conceive, that, by the law of *England*, an action for a malicious prosecution cannot be supported, unless it is proved, to the satisfaction of the Jury, *that it was malicious, and that it was without probable cause*. It has been stated, and I think correctly, that, admitting it to be malicious, yet, if there was probable cause for it, the verdict cannot be for the plaintiff; and that, admitting it to be without probable cause, if it was not malicious, the verdict cannot be for the plaintiff; the fact of the want of probable cause, however, being to be considered

(a) 6 Barn. & Cress. 225.

(c) 5 Taunt. 190.

(b) 1 Salk. 15; S. C. 1 *Ld.*
Raym. 387.

(d) 3 Dow's Parl. Cas. 180.

as evidence of the malice. But still it is but evidence; and, if the Jury should conclude, upon the whole, that there was not malice, such an action cannot be maintained; and the reason is this, that if there be probable cause for the prosecution, the policy of the law requires that men should be protected who bring forward accusations founded upon probable cause; and it would be a great deal too much to say, that every prosecution which failed, though there should be ever so much probable cause for it, must be considered as a prosecution for which the prosecutor is liable in damages. The law, therefore, protects the prosecutor, unless you can say that he has acted maliciously, and that there was no probable cause for his proceeding." That is the true principle, and is in accordance with the doctrine laid down by Mr. Justice *Buller*, in *Morgan v. Hughes* (a), viz. that the grounds of a malicious prosecution are, *first*, that it was done maliciously; and *secondly*, without probable cause. The want of probable cause is the gist of the action; and in *Freeman v. Arkell*, Mr. Justice *Park* said (b), that "the question of probable cause was a question for the Judge, and that the fact of a bill of indictment being thrown out was no proof of a want of probable cause;" and he directed a nonsuit. So, in *Turner v. Turner* (c), Lord Chief Justice *Dallas* ruled, that, in order to support an action for a conspiracy in issuing a commission of lunacy, malice and a want of probable cause must be proved; that, on proof of a total want of probable cause, malice might be implied; but that, although express malice be proved, some slight evidence of a want of probable cause must be given by the plaintiff. Here, the plaintiff did not negative the presumption that the defendant had probable cause for preferring the indictments in question, nor did he adduce

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(a) 2 Term Rep. 231.

(b) 1 Carr. & Payne, 138.

(c) Gow's N. P. C. 20.

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sufficient evidence to call on the latter to shew that he had proceeded without any reasonable or probable cause.

Mr. Serjeant *Cross*, in support of his rule.—It is quite clear that the short-hand writer's notes were not admissible at the trial, to shew what the defendant's witnesses had sworn at the trial of the indictment for perjury, as such witnesses should have been called; and although it has been said, that the Jury hesitated before they returned a verdict of acquittal, yet, they might have done so for the purpose of inspecting some document, and not on any doubt they entertained as to the defendant's motives in carrying on the prosecution; and the plaintiff adduced abundant evidence of a want of probable cause, to call on the defendant to shew that he had acted *bond fide*, and had probable cause for preferring the latter indictment. In *Farmer v. Darling*, Lord *Mansfield* said (*a*), "This action is for a malicious prosecution, without a probable cause; I cannot say that the Jury have done wrong in finding that the indictments were preferred without probable cause;" and here, whether there was sufficient evidence of a want of probable cause, should, at all events, have been submitted to the Jury. Malice, combined with other circumstances, may furnish pregnant evidence of a want of probable cause; and in *Reed v. Taylor* (*b*), it was held, that an action of this description might be maintained, if any of the assignments of perjury were malicious and without probable cause, although some were well founded; and here, although one of the causes assigned is, that there was no play at the defendant's house on *Good Friday*, and he called witnesses to prove that fact, yet the plaintiff might have lost money there early in the morning of that day; for, if the play continued after twelve o'clock at night of the preceding *Thursday*, and which in all probability it did,

(*a*) 4 Burr. 1973.

(*b*) 4 Taunt. 616.

the fact deposed to by the plaintiff on the first trial would remain uncontradicted. But, as the first bill of indictment was ignored, and the second found on the testimony of the defendant, and he left the Court when he was called as a witness, and he alone could have been cognizant of the facts under which the plaintiff lost his money, but which he feared to disclose, the Jury were not only warranted in acquitting the plaintiff, but there was enough to show that the prosecution was unfounded, and that the defendant had no ground whatever to proceed with the second indictment.

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Mr. Serjeant *Andrews*, (who was with Mr. Serjeant *Cross*), was stopped by the Court.

Lord Chief Justice TINDAL.—I think the rule for setting aside the nonsuit, and granting a new trial, must be made absolute. This is an action for maliciously, and without probable cause, indicting the plaintiff for perjury. It has been admitted by both my learned Brothers, in the course of the argument, that, in order to support such an action, there must be a concurrence of malice, and a want of probable cause in the prosecutor. It is not sufficient for the party accused to shew malice alone, but he must also prove the falsehood of the charge preferred against him; because, although a person may appear to have been actuated by the most malicious motives, yet he might have some justifiable reason for commencing the prosecution. On the other hand, the actual substantiation of the accusation by the prosecutor is not necessary, nor is he to be liable in damages for a mere failure of the prosecution; and if we were so to hold, it would impose upon him a greater burthen than the law allows; for he might have had good reason to prefer the charge, and yet be compelled to abandon the prosecution, by the death or absence of witnesses, or the difficulty of producing sufficient legal evidence; ei-

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ther of which circumstances would give a wholly different complexion to the case. The law, therefore, adopts a middle course, and only renders the party prosecuting responsible, where malice is combined with a want of probable cause. As to what shall amount to such a combination of malice, and a want of probable cause, so much depends upon the circumstances of each particular case, that it is difficult, if not impossible, to define it; nor can any general rule be laid down on the subject. But such a state of facts ought to exist, as to impress the mind of any reasonable man, and satisfy him that the party accusing had no motive for proceeding, but a malicious feeling or desire to inflict an injury on the accused, and that he could not have honestly believed that there was any true or substantial ground for the accusation, or probable cause for the prosecution. But it may be asked—Who is to be the Judge of what amounts to probable cause? In all cases, whether the party accusing had a reasonable degree of knowledge, so as to amount to a probable cause for instituting and carrying on a prosecution, is a question of law for the Judge, on the facts disclosed in evidence; and if there be any discrepancy in testimony, or doubt or imputation cast on the credit of the witnesses, those are matters for the decision of the Jury. So that, ultimately, the question of probable cause is a question of law, and may be assimilated to those—as to what shall be reasonable notice of the dishonour of a bill of exchange; or what shall be reasonable tolls, fines, or services, or other instances of a like nature. Again, it may be asked—Who is to adduce evidence to shew the absence of probable cause? Undoubtedly, the plaintiff, in the first instance, must bring forward some evidence of a want of probable cause, before the defendant can be called on to justify his conduct; because it is not to be assumed that a person has acted illegally; on the contrary, it must be inferred that he has only done his duty in preferring the charge; and before

he can be required to prove the affirmative, as the actual knowledge rests principally with him, the party who brings the action must shew a want of probable cause for the preferring of the charge against him. The question then is—Whether the plaintiff in this case produced sufficient evidence at the trial to call upon the defendant to prove affirmatively, that he had reasonable or probable cause for preferring an indictment against the plaintiff for perjury. I am of opinion, that he did. It appeared that the first bill which the defendant preferred against the plaintiff was thrown out by the Grand Jury, as the defendant neither appeared himself nor adduced any evidence in its support; nor was his name on the back of the bill as a witness. On the second indictment, his name did appear on the back of the bill; and on his evidence, corroborated by the testimony of one other witness, a true bill was found. The defendant therefore must, at all events, have considered himself to have been a witness of some importance on behalf of the prosecution; and when the principal facts are within the knowledge of the prosecutor himself, it is incumbent on him to shew that he had probable cause for preferring the charge against the accused. It also appeared, that when the trial of the indictment came on, although the defendant was in Court, he for some reason or other absented himself, at the moment when he was called on to give his testimony in support of the charge, and, after some deliberation, for what reason does not appear, the Jury acquitted the plaintiff. The transactions and nature of the dealings between the plaintiff and the defendant at the house of the latter, and which formed the main ingredients in the case, must have been peculiarly within the knowledge of the latter; and the principal assignment of perjury was, that the plaintiff had falsely sworn that he had lost money at play at the defendant's house at seventeen different times. It must, therefore, be assumed, that the money was lost to the defendant by the plaintiff's playing at

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his house. The defendant, however, did not choose to submit to be examined as a witness, but left the Court at the moment he was about to be called. On these facts, it is but fair and reasonable to infer, that the defendant had knowledge of some circumstances which he did not think proper to disclose; and his conduct, by absenting himself at the trial, coupled with the previous facts, was sufficient *prima facie* evidence to shew, that the prosecution was commenced without probable cause, or that there was such a want of it, as to throw it on the defendant to answer the plaintiff, and prove affirmatively, that he, the defendant, had probable cause for preferring the indictment in question. The short-hand writer's notes of what the witnesses said, or as to what passed at the trial of the indictment, were not admissible in evidence, by a well-known rule of law; because the witnesses themselves, if living, might, and ought to have been called. I am, therefore, of opinion, that the rule for setting aside the nonsuit, and granting a new trial, must be made absolute.

Mr. Justice PARK.—I am of the same opinion. Whatever contrariety of opinion might have existed between former Judges, in questions of this nature, a great deal of the difficulty, as well as the confusion created by earlier cases, has been removed by the principles established in *Johnstone v. Sutton*. The true distinction was there laid down by Lord *Mansfield*, aided by Lord *Loughborough*, in a most elaborate judgment on the decision of that case in a Court of error, and where it is said, that (a)—“The question of probable cause is a mixed proposition of law and fact. Whether the circumstances alleged to shew it probable or not probable are true and existed, is a matter of fact; but whether, supposing them true, they amount to a probable cause, is a question of law.” That

(a) 1 Term Rep. 545.

principle has been acted on ever since; and I adopted it in the late case of *Davis v. Russell*, where I said (a):—"That, although I admitted that the question of reasonable or probable cause is a question of law for the Judge, yet that it must be necessarily compounded of facts on which the Jury must decide; and that it had been my constant practice, in cases of this description, to leave it to the Jury to say, whether they believe the facts, as proved, to be true; and if they do, I tell them whether or not I think that they amount to a reasonable and probable cause to justify the party for the act done."—There can be little if any difficulty as to which of the parties is to offer the first proof of the absence or want of probable cause. The defendant is not bound to prove an affirmative, or justify his conduct in the first instance; and in *Purcell v. Macnamara*, Mr. Justice *Le Blanc* said (b)—"An action for a malicious prosecution cannot, from the very nature of it, be maintained without proof of malice, either express or implied; and malice may be implied from the want of probable cause; *but that must be shewn by the plaintiff*. That is sound law, and consistent with what that learned Judge before ruled in *Incedon v. Berry*, viz. that although express malice be proved, some slight evidence must be given on the part of the plaintiff of a want of probable cause, before the defendant can be called on for his defence. It is true, that, in *Wallis v. Alpine*, Lord *Ellenborough* laid down, that the mere non-prosecution of a charge made on oath against another, was not sufficient to throw the *onus* on the defendant, of shewing a probable cause. And Lord *Kenyon*, in *Smith v. Macdonald* (c), ruled, that if, upon an indictment for felony, the Jury pause before they acquit the prisoner, it is evidence of probable cause. Although in *Sykes v. Dunbar* (d), where *A.*, as attorney for *B.*, sued *C.* in the

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(a) 2 Moore & Payne, 609.

(b) 9 East, 363.

(c) 3 Esp. Rep. 7.

(d) 1 Camp. 202, n.

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Exchequer, and *C.* indicted *A.* and *B.* for a conspiracy, who were acquitted, and *A.* afterwards brought an action against *C.* for maliciously indicting him, in which he proved that the suit in the *Exchequer* was well founded, and that *C.* did not appear to prefer his indictment:—Lord *Kenyon* held, that this was not sufficient to throw on *C.* the burthen of shewing probable cause; yet his Lordship there drew a distinction where the facts to be proved lay in the knowledge of the defendant alone. And in *Buller's Nisi Prius* (*a*), it is said, that “where the facts lie in the knowledge of the defendant himself, he must shew a probable cause, though the indictment be found by the Grand Jury, or the plaintiff shall recover without proving express malice; and the case of *Parrot v. Fishwick* (*b*), is referred to. And, in *Hunter v. French*, Mr. Justice *Burnett* is reported to have said (*c*), “where a person is acquitted by a Jury, malice need not be proved at first on the part of the plaintiff, but it is incumbent on the defendant to shew, on the other side, that there was a probable cause; but that, where the indictment is quashed, it is necessary for the plaintiff to prove express malice; and that this distinction would reconcile all the differences in respect to this matter.” The true distinction to be drawn in actions of this description is, that they must be founded on malice by the defendant, either express or implied, and a want of probable cause; and although malice may be implied, from the total want of probable cause, the plaintiff must shew it, unless the facts lie within the knowledge of the defendant himself. The question therefore is, whether, under all the circumstances of this case, adduced on the part of the plaintiff, there was sufficient to throw the burthen of proof on the defendant, and call on him to shew, that he had probable cause for preferring the two bills of indictment against the plaintiff.

(*a*) 7th Edit. by Bridgman, 14.

(*b*) 9 East, 362, n.

(*c*) Willes, 520.

The first bill was ignored, as the defendant offered no evidence before the Grand Jury, nor was his name upon the back of the bill as a witness. The second bill was found on the testimony of the defendant himself; and although he was in Court at the trial, yet, as soon as he discovered that he was about to be called as a witness, he withdrew, and the plaintiff was acquitted accordingly. Besides, the defendant not only effectually opposed bail offered by the plaintiff, but caused him to be imprisoned under the new charge, although the plaintiff had before put in bail on the same charge; and the last indictment was left pending over the plaintiff's head for more than three years after it was preferred. All these circumstances appear to me to afford a strong ground, from which malice and a want of probable cause may be inferred. The defendant alone could have explained the circumstances under which the last bill was preferred and found, as it depended on the nature of his testimony before the Grand Jury. I therefore think, that the plaintiff adduced sufficient evidence to call on the defendant to shew that he had a probable cause for preferring the latter indictment. I concur with my Lord Chief Justice, that the short-hand writer's notes of what took place at the trial of the indictment, ought not to have been admitted in evidence on the trial of this cause; but, as my Lord *Wynford* said, that he did not think them entitled to any weight, it is unnecessary to consider that point. But I do not think that the plaintiff ought to have been nonsuited; and although Lord *Kenyon* said, in *Smith v. Macdonald*, "that if the evidence offered to the Jury by a prosecutor, on the trial of an indictment, be sufficient to cause them to pause, he should hold it to be a probable cause;" I cannot accede to that doctrine; for a person might then suffer from the prejudices or capricious feelings of a Jury.

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Mr. Justice BURROUGH.—The principal, if not the only

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question in this case is, whether the nonsuit ought not to be set aside? I am clearly of opinion that it ought. What shall be deemed to amount to a probable cause, is always a question for the Judge alone; and if the Jury believe the facts before them to be true, it is for the Judge to tell them, whether, in his opinion, they amount to a probable cause. There can be no doubt but that the short-hand writer's notes, as to what took place on the trial of the indictment, were improperly received; and as they were read as evidence in this cause, the Lord Chief Justice might have been in some degree influenced by them. But I think, that, independently of those circumstances, he ought not to have nonsuited the plaintiff. The first bill of indictment preferred against him by the defendant was ignored, as the latter did not appear before the Grand Jury in its support; and, on the trial of the second indictment, the bill having been found on the testimony of the defendant, just before he was called as a witness, it appeared that he had left the Court, and the plaintiff was acquitted. The defendant's absenting himself at the moment his testimony was required, he having been in Court at the commencement of the trial, is a strong circumstance to shew that he had caused the indictment to be preferred without probable cause. One of the principal questions for the consideration of the Jury was, whether the defendant's house was open on *Good Friday*, and whether the plaintiff had played and lost money there on that day; and if the Jury had found that he had, and that he had lost money to the defendant at other times, and which might have been elicited from him on cross-examination, the plaintiff would have been entitled to an acquittal. At all events, it appears to me, that the plaintiff adduced sufficient evidence to call on the defendant to shew that he had probable cause for instituting and carrying on the prosecution.

Mr. Justice GASELEE.—This case has been so fully

gone into by the Court, that it is only necessary for me to make a few observations. We are not called upon to decide the merits, for the only question is, whether the evidence adduced by the plaintiff warranted the Lord Chief Justice in directing a nonsuit, without calling on the defendant to shew that he had a probable cause for preferring the indictment in question. I think not. The facts proved by the plaintiff are extremely strong, to shew, that the defendant proceeded against him without a reasonable or probable cause. The first indictment failed from want of evidence by the defendant as the prosecutor. The bill on the second was found on his testimony alone, corroborated indeed by one other witness. The defendant, therefore, must, or ought to have been aware, that he was a most material witness on the trial of the indictment; and, although the mere abandonment of a prosecution is not of itself sufficient proof of a want of probable cause for instituting it, yet here the facts proved by the plaintiff were far stronger, as the defendant neglected to prosecute the second indictment for three years, and absented himself at the very moment he was called on to support it at the trial; and as witnesses were previously called for him, who stated that his house was shut up on *Good Friday*, yet the material remaining question was, whether the plaintiff had lost money at play, at the defendant's house, at the different times, as alleged by him in the action against the defendant. That must have been peculiarly within the knowledge of the defendant, and, in all probability, he did not like to be examined as to that fact. But, it appears to me, that the studied delay by the defendant in not carrying down the last indictment for trial, and his absenting himself when his testimony was required to support it, were sufficient grounds to cast on him the burthen of shewing that he had probable cause for carrying on the prosecution against the plaintiff. The rule for setting aside the nonsuit must, therefore, be made—

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The defendant, an auctioneer, offered two policies of assurance for sale by auction, and it was stated in the particulars, that the policies would be sold by order of the executors of a mortgagee, and under a power of sale. The plaintiff purchased one of the policies, and deposited part of the purchase money with the defendant at the time of the sale:

—*Held*, that the vendors were bound to produce a clear and indisputable title:—and the mortgagor having assigned the policy by deed to the mortgagee; and a subsequent deed between the same parties, on a further advance by the mortgagee, contained a power of sale, if the principal sum were not paid on a given day; and on a further advance by the mortgagee, a third deed was entered in, to, by which the interest remaining unpaid was to be converted

into principal, but the power of sale was omitted; and the vendors declined to procure the concurrence of the mortgagor to the assignment of the policy to the plaintiff:—*Held*, that he was entitled to recover back his deposit, but without interest.

THIS was an action of *assumpsit*, and brought by the plaintiff, to recover from the defendant the sum of 322*l.*, and interest thereon, at 5*l. per cent.*, from the 15th October, 1828. The declaration contained the usual money counts, a count for interest, and on an account stated. The cause was tried before Lord Chief Justice *Best*, at *Guildhall*, at the first Sittings in the last Term, when a verdict was, by consent, taken for the plaintiff, damages, 500*l.*, subject to the opinion of this Court upon the following case:—

The defendant, an auctioneer, offered for sale by auction, at the Auction Mart, on the 15th October, 1828, two policies of assurance, in the Society for Equitable Assurances, according to certain particulars and conditions of sale. The particulars stated, that such policies would be sold, by order of the executors of the mortgagee, *John Chatfield, Esq.*, deceased, and under a power of sale.

The plaintiff attended the sale, and was declared the purchaser of the second lot mentioned in the particulars of sale for the sum of 1610*l.* The lot was described as a policy of assurance, No. 24,143, for the sum of 2000*l.*, effected with the Equitable Society, *Blackfriars, June 18th, 1808*, by a gentleman, now in the sixty-first year of his age, or thereabouts, with the accumulations thereon, amounting to 1100*l.* or thereabouts, making in the whole, 3,100*l.* or thereabouts, annual premium, 69*l.* 16*s.* The fourth condition of sale provided, that the purchasers should, at their own expense, have proper assignments from the vendors, on payment of the residue of the purchase-money. The plaintiff paid the sum of 322*l.* as a deposit, for which he took a receipt, of which the following is a copy:—

" *Auction Mart*, 15th *October*, 1828.

" Received of *Daniel Curling*, Esqr., three hundred and twenty-two pounds, being a deposit of twenty *per cent.* upon the purchase of Lot 2, of Equitable Policies, bought by him this day, for the sum of 1,610*l.*

£ 322.

For

G. E. Shuttleworth,
Jno. Appleton."

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The plaintiff also signed an agreement, indorsed on a particular of sale, of which the following is a copy :—

" *London*, *October* 15th, 1828.

" I hereby agree to purchase Lot 2, described in this particular, agreeably to the annexed conditions, and to give for the same the sum of one thousand six hundred and ten pounds.

" Witness, *Jno. Appleton.*

Daniel Curling."

" Deposit, £ 322.

The sixth condition of sale provided, that if, through any mistake, the policies should be improperly described, or any error or misstatement be inserted in that particular, such error or misstatement should not vitiate the sale thereof, but the vendors or purchasers, as the case might happen, should pay or allow a proportionate value, according to the average of the whole purchase-money, as a compensation either way.

On the 21st *October*, 1828, an abstract of the title of the vendors to the policy was delivered by their solicitors to the solicitors of the plaintiff, which set out the following documents, *viz.*—a policy of insurance in the usual form, dated the 18th *June*, 1808, numbered 24,143, and under the hands and seals of two of the trustees of the Society for Equitable Assurances on lives and survivorships, on

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the life of *Charles Bankhead*, of *Brighton*, in the county of *Sussex*, Doctor of Medicine.

An indenture, dated the 1st *February*, 1812, and made between the said *Charles Bankhead*, of the one part; and *John Chatfield*, Esq., of the other part; whereby, in consideration of 845*l.*, therein mentioned to be due and owing from the said *Charles Bankhead* to the said *John Chatfield*—He, the said *Charles Bankhead*, assigned unto the said *John Chatfield*, his executors, administrators, and assigns, (together with another policy), the said policy of assurance, and all money then due or to become due by virtue thereof, subject to a proviso for redemption, on payment of the sum of 845*l.* and interest, at 5*l. per cent.* on the 1st day of *March* then next.

A deed poll, indorsed on the said last-mentioned indenture, dated the 3rd *April*, 1813, under the hand and seal of the said *Charles Bankhead*, reciting a loan from the said *John Chatfield* to the said *Charles Bankhead*, of 560*l.*, in addition to the said sum of 845*l.*, the whole of which sum of 845*l.* and interest, as well as the said sum of 560*l.*, still remained due to the said *John Chatfield*; and that the said *Charles Bankhead* had agreed to make such further assurance for securing the same as thereafter mentioned, in consideration of the said sum of 560*l.*, and for securing the repayment thereof, and such further sums as thereafter mentioned, with interest; he the said *Charles Bankhead* covenanted with the said *John Chatfield*, that the said policy of assurance, and all other the premises by the last-mentioned indenture assigned, should stand charged with, and be a security unto the said *John Chatfield*, his executors, administrators, and assigns, as well for the payment of the said sum of 845*l.* and interest, and the said sum of 560*l.* and interest, as also for all such further and other sum and sums of money as might be advanced and lent, or paid, unto or for the said *Charles Bankhead*, by the said *John Chatfield*, his executors, administrators,

or assigns, or which might be paid by the said *John Chatfield*, his executors, administrators, or assigns, to the said assurance office, or otherwise, to keep on foot the said policy, and the full benefit thereof, together with interest, and of all such costs, charges, and expenses, as therein mentioned, not exceeding in the whole, exclusive of the said sum of 845*l.*, the sum of 3000*l.*; and that the said policies and premises should not be redeemed or redeemable either in law or in equity, until not only the said sum of 845*l.* and interest, and 560*l.* and interest, but also all such further sum and sums of money which might at any time be lent, advanced, or paid by the said *John Chatfield*, to or for the said *Charles Bankhead*, should be fully paid, and satisfied.—And for the considerations in the said deed poll before mentioned, and for better securing to the said *John Chatfield*, his executors, administrators, and assigns, the due payment of the said several sums of 845*l.* and 560*l.*, and such further sums of money as might be paid, advanced, or lent, by the said *John Chatfield*, his executors, administrators, and assigns, by virtue of the said deed poll, *with interest for the same*, as therein aforesaid, the said *Charles Bankhead* did thereby *expressly and fully authorise and empower the said John Chatfield*, his executors, administrators, or assigns, in case the said several sums of 845*l.* and 560*l.*, and such (if any) further sum or sums of money as might be advanced, or paid, as therein aforesaid, with interest as therein aforesaid, should not be fully paid off and satisfied to the said *John Chatfield*, his executors, administrators, or assigns, on or before the 1st *June* then next, at any time or times after the said 1st *June* then next, to *sell and absolutely dispose of the said policy of assurance*, and all benefit and advantage thereof, either by public auction or private contract, unto any person or persons whomsoever, for any reasonable price which could at the time of such sale be obtained for the same, and to seal, execute, and deliver, all such deeds, convey-

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ances, and assurances, as might be requisite and proper for the completion of such sale or sales, and vesting the said premises in the purchaser or purchasers thereof; and to stand possessed of and interested in all and every the sum and sums of money, which should arise and be produced from such sale or sales, upon trust, after paying thereout the costs of the sale, to retain the said sums of 845*l.* and 560*l.*, and such sum or sums of money as might thereafter be paid, advanced, or lent, by the said *John Chatfield*, his executors, administrators, or assigns, in pursuance of the said deed poll, or the indenture of the 1st *February*, 1812, and interest; and to pay the residue unto the said *Charles Bankhead*, his executors, administrators, or assigns. And it was by the said deed poll declared, that all contracts, agreements, sales, conveyances, and assurances, acts, deeds, matters, and things, which should be entered into, made, done or executed by the said *John Chatfield*, his executors, administrators, or assigns, of or concerning the said policy and premises, should, to all intents and purposes, be valid and effectual, although the said *Charles Bankhead*, his executors or administrators, should not execute, join, concur in, or assent to the same; and that the purchaser or purchasers should be entitled to have, hold, and enjoy the same, against the said *Charles Bankhead*, his executors, administrators, and assigns, and all persons claiming or to claim under or in trust for him or them, in like manner as if the said *Charles Bankhead*, his executors, administrators, or assigns, had been a party to and executed the conveyance or assurance thereof, free from all equity and benefit of redemption, claim, and demand whatsoever; and that the receipts of the said *John Chatfield*, his executors, administrators, or assigns, should be sufficient discharges to the purchasers of the said premises, and that such purchasers should not afterwards be answerable for any loss, mis-application, or non-application of their purchase-money.

An indenture, dated the 3rd *June*, 1822, and made between the said *Charles Bankhead*, of the one part; and the said *John Chatfield*, of the other part; after reciting, amongst other things, the indenture of the 1st *February*, 1812, and the deed poll of the 3rd *April*, 1813; and reciting a certain indenture of settlement, by virtue whereof the said *Charles Bankhead* was entitled to a contingent estate for life, and a contingent reversionary interest in certain leasehold property, held under renewable leases granted by the Lord Primate of *Ireland*; and also reciting that the said sum of 845*l.*, secured by the said indenture of the 1st *February*, 1812, was then still due to the said *John Chatfield*, together with all interest for the same, to the 1st *January* then last; and that the said sum of 560*l.*, secured by the said deed poll of the 3rd *April*, 1813, was still due to the said *John Chatfield*, together with lawful interest thereon up to the 1st *January* then last; and also reciting that the said *John Chatfield*, on the 1st *January*, 1814, lent to the said *Charles Bankhead*, on the security of the said deed poll, a further sum of money, making, with the interest due at that time on the said two several sums of 845*l.* and 560*l.*, the sum of 1,295*l.*, and for which said sum of 1,295*l.* the said *Charles Bankhead* gave his note of hand to the said *John Chatfield*, payable on demand, with legal interest for the same; and also reciting that all interest in respect of the said sum of 1,295*l.* was due to the said *John Chatfield*, up to the said 1st *January* then last; and, that the said sums secured by the said recited indenture and deed poll, and the interest for the same respectively, up to the 1st *January* then last, made together the sum of 3,780*l.*, which it had been agreed should be all considered as principal, and should carry interest on the whole amount thereof from the 1st *January* then last; and also reciting that the said *John Chatfield* had then lately paid or advanced to or on account of the said *Charles Bankhead*, or had become se-

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curity for him for several sums of money, making, in the whole, 923*l.* 12*s.* 10*d.*; and that, in order further to secure the repayment to the said *John Chatfield*, of the said sums of 3,780*l.* and 923*l.* 12*s.* 10*d.*, making together 4,703*l.* 12*s.* 10*d.*, and interest for the same, and of such further or other sums of money as thereafter mentioned, in manner thereafter expressed, the said *Charles Bankhead* had agreed to subject and charge the said policy in manner thereafter mentioned; and also to execute such assignment of the reversionary estates and interest of him the said *Charles Bankhead* in the premises comprised in the said thereinbefore in part recited indenture of settlement, as is thereafter contained:—It was witnessed, that, in pursuance of the said agreement, and in consideration of the premises, and for the nominal consideration therein mentioned, the said *Charles Bankhead* did subject and charge the said policy of assurance with the payment to the said *John Chatfield*, his executors, administrators, or assigns, of the said sum of 4,703*l.* 12*s.* 10*d.* including the said sums of 845*l.* and interest, and 3000*l.* and interest, so secured by the said indenture of the 1st *February*, 1812, and deed poll, and such further sums of money as should or might thereafter be advanced or paid by the said *John Chatfield*, his executors, administrators, or assigns, to or on account of the said *Charles Bankhead*; or which should or might at any time thereafter become due or owing from the said *Charles Bankhead* to the said *John Chatfield*, on any account whatsoever, with interest; *subject nevertheless* to a proviso for making void the said indenture and every clause, matter, and thing therein contained, on payment by the said *Charles Bankhead*, his heirs, executors, or administrators, unto the said *John Chatfield*, his executors, administrators, or assigns, of the sum of 3,780*l.* on the 1st *January* then next, with interest at 5*l.* *per cent.* from the 1st *January* then last; and also on payment of 923*l.* 12*s.* 10*d.*, and of all such further sums as the said *John Chatfield* should pay for keeping on foot

the said policy, or otherwise, for the use or benefit, or on account, of the said *Charles Bankhead*, with interest. And the indenture also witnessed, that, in further pursuance of the said agreement, the said *Charles Bankhead* did grant and assign to the said *John Chatfield*, his executors, administrators, and assigns—all those the reversionary estates or interests to which, by virtue of the indenture of settlement therein recited, he, the said *Charles Bankhead*, might eventually become entitled in the premises therein comprised: To hold the same unto the said *John Chatfield*, his executors, administrators, and assigns, absolutely, subject nevertheless to the proviso or condition for redemption thereinbefore contained.

The said *John Chatfield* died subsequently to the date of the deed lastly above recited, having previously made his will, appointing the vendors of the policy in question his executors, and probate was duly granted to such vendors.

The said *Charles Bankhead*, since the execution of the indenture of the 3rd June, 1822, executed mortgages of, or other incumbrances upon, the policy in question, to other persons.

The plaintiff required, that the title of such subsequent incumbrancers should be shewn, and that they and Dr. *Bankhead* should join in the assignment to the plaintiff. The solicitors for the vendors declined to produce such title, or to procure the concurrence of the incumbrancers and Dr. *Bankhead*, in the assignment. This action was thereupon brought by the plaintiff against the defendant, to recover the amount of the deposit on the sale, being 322*l.* and interest at 5*l. per cent.* from the 15th October, 1828, the day on which it was paid.

The question for the opinion of the Court was, whether, under the circumstances stated in the case, a good title had been made to the policy sold to the plaintiff. If the Court should be of opinion that a good title had not been

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made, the verdict for the plaintiff was to stand, but its amount was to be reduced to such sum as the Court should think proper:—But, if the Court should be of opinion that a good title had been made, a nonsuit was to be entered.

The case now came on for argument.

Mr. Serjeant *Wilde*, for the plaintiff.—The question is, whether the abstract of the title delivered to the plaintiff's solicitors, by those of the vendors of the policy purchased by the plaintiff, is sufficient to call upon him to pay the residue of the purchase-money, or take an assignment of such policy without shewing the title of subsequent incumbrancers, and their concurrence, as well as the concurrence of the mortgagor, and their being made parties to, and joining in the assignment? It is a settled rule, that a person cannot be compelled to take an assignment of a mortgage, without the privity of the mortgagor; for, although it is not necessary to give notice to the latter that the mortgage has been assigned, yet the assignee takes it subject to the account between the mortgagor and mortgagee. It must, however, be admitted, that, when a regular mortgage deed contains a power of sale, it is valid without the assent or concurrence of the mortgagor, for it is now frequently the practice to give the mortgagee a power of sale over the estate, in case default is made in payment of the mortgage-money beyond a limited and stated period. Courts of equity, however, lean against powers of sale: but the principles laid down as to such powers are not applicable to the present case, as the policy in question was not sold under the power; because the deed of the 3rd June, 1822, annulled the previous contract, and created a new debt, as the interest then due and remaining unpaid by the mortgagor was thereby agreed to be considered as converted into principal; and there was no mention whatever of the power of sale, which was only inserted in the previous deed of April, 1813. When,

therefore, the mortgagor and mortgagee executed the last deed, the power in the second was altogether extinguished. If a mortgagee sell, where there is no power of sale expressly given, he merely sells the mortgage debt, with his interest in it, but not the security on which such debt is founded. Such a sale leaves the mortgagor an equitable right to redeem as against the purchaser; and here, when the life in the policy drops, the purchaser or assignee would become a trustee for the representatives of the mortgagor, for all beyond the amount of the sum secured by the mortgage. Although, in the case of an assignment from a mortgagee, payments made in part of principal or for interest may not be indorsed on the deed, still, if such payments have been made, the assignee is liable to account to the mortgagor, as he has a right to insist on his equitable claims; and here, although the executors of the mortgagee might have had a right to sell the policy in question under the power in the second deed, and by which the assignee would be bound without the concurrence of the mortgagor, yet the time of sale under such power was past, as, by the former deed, the payment was to have been made on or before the 1st *June*, 1813, and, by the last deed, the time for payment was extended to the 1st *January*, 1823, which was altogether a new bargain or contract; independently of which, a new debt was created, and the policy was not only made subject to a further charge, but the sum due for interest was converted into principal. The plaintiff, as the purchaser at the sale, had no means of ascertaining whether any of the principal or interest had been paid under the second deed, and the power of sale therein contained being extinguished by the last deed, and in which no allusion was made to the power, there could be no valid or legal assignment of the policy to the plaintiff, as purchaser, without the concurrence of the mortgagor. As, therefore, by the new contract in the deed of *June*, 1822, the mortgagee gave the mortgagor all the equitable remedies which belong to him as such, and he might redeem at any time be-

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fore foreclosure, and does not now concur in the assignment to the plaintiff, although called upon to do so, the plaintiff is entitled to recover back his deposit, and cannot be compelled to complete his purchase either by equity or by law; and, as the defendant might have invested the sum deposited with him in the funds, or placed it out on some security on which interest might have been obtained, he is liable to the plaintiff for the amount of the sum deposited, together with interest.

Mr. Serjeant *Russell, contra*.—The plaintiff having deposited the sum sought to be recovered by this action, with the defendant in his character of auctioneer, it is quite clear, that the latter cannot be liable to interest; for, in *Lee v. Munn* (a), where all the previous authorities on this subject were referred to and considered, it was held, that where the purchaser of an estate deposits money with the auctioneer, by way of deposit, at the sale, he is not liable for interest, unless a demand be made on him for the re-payment of the deposit; and here, it does not appear that any demand has been made. The question then is, whether the vendors of the policy purchased by the plaintiff are in a condition to make a good title to him as vendee, so as to call upon him to complete his purchase. It is quite clear, that a mortgagee has a right to sell a personal chattel, in order to repay himself the sum advanced to the mortgagor; and here, the power of sale in the deed of 1813, which was unqualified and absolute, was not affected by the subsequent deed of 1822; and even if it were, the executors of the mortgagee were authorized to sell and assign the policy to the plaintiff, without such power: and the concurrence or joinder of the mortgagor was not necessary with reference to the assignment. If the vendors can make a good title, it is sufficient; and, by the sixth condition, it is provided, that if, through

(a) 1 B. Moore, 481.

any mistake, the policies offered for sale should be improperly described, or any error or misstatement inserted in that particular, such error should not vitiate the sale, but the vendors or purchasers should pay or allow a proportionate value, according to the average of the whole purchase-money, as a compensation either way. There is a wide distinction between a sale of a real estate by a mortgagee, and the sale of a personal chattel. In the case of realty, it must be admitted, that the assignee only takes the sum secured by the mortgage, subject to redemption by the mortgagor, who has also an equitable claim for any sums paid to the mortgagee in reduction of principal or interest, as the case may happen; but, in the case of a mortgage of personalty, where a day is fixed for the repayment of the sum advanced, the mortgagee has a right, both at law and in equity, to sell, and to satisfy himself out of the proceeds of the sale. In *Tucker v. Wilson* (a), where exchequer annuities were mortgaged, and the day appointed for payment was passed; it was held, that the mortgagee might at once proceed to a sale, and repay himself principal and interest without any authority from the mortgagor, and without filing a bill of foreclosure. So, in *Lockwood v. Ewer*, Lord Chancellor *Hardwicke* drew the distinction, and said (b)—“ In a mortgage of land, a bill of foreclosure ought to be brought, but on a mortgage of stock it is not necessary;” and his Lordship refused to decree a redemption, and dismissed the bill in which it was prayed. So, in *Kemp v. Westbrook*, his Lordship said (c)—“ The pawnee of stock is not bound to bring a bill of foreclosure of the equity of redemption of the stock, but may sell it.” It therefore follows, that the mortgagee may sell without the concurrence of the pawnor, or mortgagor; and in *Casenove v. Prevost*, Mr. Justice *Holroyd* laid it down in general terms (d)—“ that, where a person has a simple lien on goods, he cannot sell

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(a) 1 Peere Wms. 261.

(c) 1 Vez. sen. 279.

(b) 2 Atk. 303.

(d) 5 Barn. & Ald. 78.

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and dispose of them ; but if he has a special property in those goods, in trust for another, subject to a claim of his own, in such case the party may sell, in order to repay himself." Here, therefore, although there were no power of sale, the vendors were, on the authority of those cases, authorized to sell the policy, and to make a good title to the purchaser; and, although the conditions state the sale *to be under* a power, yet, that is immaterial, if a good and sufficient title can be made without it. But a deed of conveyance must be construed according to the intention of the parties; and the deed of 1822 refers to, and recites, the antecedent deeds of 1812 and 1813, and treats them as existing securities; and the power of sale in the second deed was merely suspended for a short time, *viz.* between the date of the deed of 1822, and the day therein named for payment of the sum thereby secured. It is quite clear, that the mortgagee did not mean that the power of sale should be extinguished by the mortgagor's giving a further or additional security. Both deeds are equally available, and the one is as high a security as the other; and in *Drake v. Mitchell*, Mr. Justice *Le Blanc* said (a)—“The giving of another security, which, in itself would not operate as an extinguishment of the original one, cannot operate as such by being pursued to judgment, unless it produce the fruit of a judgment;” and, it was consequently decided in that case, that an action on a covenant for non-payment of money might be maintained, notwithstanding a promissory note was given, after the day covenanted for payment, by the defendant to the plaintiff, ‘in payment and satisfaction of the debt,’ and on which judgment had been recovered, as it did not appear that the note was *accepted* as well as given in satisfaction, or that it had *actually produced satisfaction*. So, in *Kaye v. Waghorn* (b), it was held, that a bond given in lieu of a covenant not broken, pursuant to a simple

(a) 3 East, 259.

(b) 1 Taunt. 428.

agreement, but not expressed to be given, will not discharge the covenant. Although it may be said, that as, by the last deed, it was agreed that the interest remaining due should be considered as and converted into principal, it thereby became a new debt; yet there can be no objection to an agreement *inter partes*, that such interest shall be considered principal, and thenceforth carry interest, for it would be injurious to the mortgagor to establish the contrary; as it would remove an inducement to the mortgagee's permitting his principal to remain: and in *Brown v. Barkham* (a), such an agreement was fully recognized; and equity now considers the arrear of interest so converted into principal in the light of a *further advance* (b); although in *Digby v. Craggs* (c), Lord *Henley* determined, that a prior incumbrancer, *having notice of subsequent incumbrancers*, could not turn the arrears of interest into principal, as against such subsequent incumbrancers. As, therefore, the power of sale in the deed of 1813 was merely suspended by the subsequent deed of 1822, the concurrence of the mortgagor was unnecessary; and, as the policy in question was merely a personal chattel, it is quite clear that the executors of the mortgagee had a right to sell it; and, by the fourth condition, the assignment was to be made by the vendors alone;—the plaintiff is therefore bound to complete his purchase, and cannot be entitled to recover back the sum deposited with the defendant at the time of the sale.

Lord Chief Justice TINDAL.—I think that the verdict taken for the plaintiff ought to stand for the principal sum sought to be recovered, *viz.* 322*l.*, being the amount of the deposit made by him at the sale. With respect to interest, the law does not allow it in such a case. As to the plaintiff's right to recover the principal sum, the rule is,

(a) 1 Peere Wms. 654.

(b) Coote on Mortgage, 439.

(c) Ambler, 612; S. C. 2 Eden's Rep. 200.

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that where, upon the sale of an estate, the title of the vendor is so questionable as to excite doubt or difficulty, or to render it probable that the right of the purchaser may become a matter of investigation in a Court of equity, a Court of common law will not compel the vendee to complete the purchase, as he cannot be obliged to accept or take a doubtful, or even an equitable title. The particulars of sale stated, that the policies would be sold by order of the executors of a deceased mortgagee, and *under a power of sale*. It was therefore incumbent on the vendors to have shewn, not only a valid and subsisting power of sale, but that their right to sell was unquestionable and beyond all doubt. Although one of the conditions provides, that, "if, through any mistake, the policies should be improperly described, or any error or misstatement be inserted in this particular, such error or misstatement shall not vitiate the sale thereof, but the vendors or purchasers shall pay or allow a proportionate value, according to the average of the whole purchase-money, as a compensation either way;"—yet, that cannot relate to the right or title of the vendors to sell, but only to a mis-description of the policies. The question then is, whether the vendors had so clear a power to sell the policies in question, that no reasonable doubt upon the subject could be entertained. Supposing the power of sale in the deed of 1813, to have been only suspended by the subsequent deed of 1822, there may be very considerable doubt as to what extent a Court of equity might consider such suspension to operate. So, it is extremely doubtful whether the power of sale given by the second deed was not annulled or extinguished by the last. It appears to me, however, to be enough to say, that in this case there is such a reasonable degree of doubt, as to render it more than probable, that the right of the purchaser to demand the benefit he expected to derive under the policy might be disputed; and therefore we ought

not to compel him to complete his purchase, or to accept a doubtful title.

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Mr. Justice PARK.—I am of the same opinion. It has long been a settled and invariable rule, that a purchaser of a real estate cannot be compelled to accept a doubtful title; and we ought not to drive parties into a Court of equity, which we certainly should do in this case, if we were to hold that the plaintiff was not entitled to recover back the deposit made by him at the sale. As to the claim for interest, the case of *Calton v. Bragg* (a) established a general principle, that, upon mere simple money contracts, interest is not allowable by law, without some agreement for it expressed, or to be implied, from the usage of trade, or from other special circumstances. Although, in *Farquhar v. Farley* (b), it was held, that if a purchaser pay a deposit to an auctioneer at the time of sale, in part of the purchase-money, and bring an action against the latter to recover it back, in consequence of the vendor's being unable to make a good title, the purchaser is entitled to interest on the deposit from the time the purchase should have been completed, and that he might recover it from the vendor, on alleging the special damage in the declaration: yet, in the subsequent case of *Lee v. Mann* (c), where the purchaser of an estate deposited part of the purchase-money with the auctioneer at the time of sale, which was to remain in his hands until the vendor should make out a good title, in an action to recover such deposit from the auctioneer, it was held, that he was not liable for interest, although several years had elapsed from the time of the sale, *no demand having been made on him* for the repayment of the deposit; and Mr. Justice Dallas there said (d)—“It has been decided, in many cases, that

(a) 15 East, 223.

(b) 1 B. Moore, 322.

(c) 1 B. Moore, 481.

(d) Id. 491.

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a principal is liable for interest; but it has never been held, that a purchaser is entitled to recover interest from an auctioneer with whom money has been deposited. Still, however, an auctioneer may or may not be liable, according to the nature and circumstances of the case. There is, however, a wide distinction between the situation of a principal and an auctioneer; for the latter merely engages to keep the money safely in his possession, as a stakeholder, and, if the auctioneer should fail, the purchaser has a remedy against the principal. Although the principal is liable for the deposit, still the auctioneer is only bound to retain it; and his liability, therefore, cannot attach until a demand be made on him for its repayment." My Lord Chief Justice *Gibbs*, my brother *Burrough*, and myself, concurred in that case; although, for the reasons there stated, I abstained from deciding the question as to the general liability of an auctioneer to pay interest on a deposit made by a purchaser, on failure of the vendor to make out a good title, according to the conditions of sale.

Mr. Justice BURROUGH.—Unless it be shewn that an auctioneer has made some use of, or derived a benefit from a sum deposited with him by a purchaser, the latter cannot be entitled to interest. With respect to the principal sum deposited by the plaintiff with the defendant, it is quite clear that, if there be a reasonable doubt as to the validity or sufficiency of the vendor's title, a Court of common law cannot compel a purchaser to accept it. Here, it appears to me, that, by the last deed, the mortgagor and mortgagee not only entered into a new contract, but that it had the effect of destroying the two former deeds. A further charge was created by the deed of 1822; and the interest remaining unpaid was converted into principal, and the power of sale was altogether omitted, nor was any reference made to it in the former deed of 1813. I am therefore of opinion, not only that the terms of the last deed raise

a considerable degree of doubt and nicety, but that we ought not to compel the plaintiff to complete the purchase, as it does not appear that he had notice of the existence of either of those deeds at the time of the sale. The condition, that, if the policies should be mis-described, it should not vitiate the sale, but that the vendors or purchasers should pay or allow a proportionate value as a compensation, does not appear to me to apply, as the title of the vendors is matter of substance, and goes to the root of the transaction, and cannot be considered as a mis-description of the policies offered for sale.

Mr. Justice GASELEE concurring—

Judgment for the plaintiff.

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THIS was an action of *assumpsit* on a policy of assurance. The *first* count of the declaration stated, that heretofore, to wit, on the 29th *March*, 1823, in parts beyond the seas, to wit, at *Copenhagen*, in the kingdom of *Denmark*, to wit, at *London*, one *William Adams*, then and there being commander of a certain schooner brig, called the *Clarence*, of *Bristol*, in *Great Britain*, according to the custom of merchants, made his certain writing obligatory or bottomry bond, sealed with the seal of the said *William Adams*, which said writing obligatory the plaintiffs now bring here into Court, the date whereof is the same day and year aforesaid, and the tenor thereof is as follows:—

vanced the money effected an insurance on the ship and cargo, and his interest was described to be on *bottomry*, free from average and without benefit of salvage:—*Held*, that this was not a bottomry contract, as the claim of the lender did not depend upon the risk or perils of the voyage, as the vessel was to be liable whether she arrived at *London* or not; and the bond and interest being described as on *bottomry* in the declaration, it was a mis-description, and that the assuer could not recover.

Friday,
July 3rd.
The master of a ship in a foreign port, by an instrument under seal, bound himself, the ship, freight, and cargo, for the repayment of money advanced for her repairs, with 12l. per cent. *bottomry premium*, in eight days after his arrival in *London*; and the vessel, freight, and cargo, were to be liable, whether she arrived there or not. The party who ad-

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"I, the underwritten *William Adams*, commander of the schooner brig *Clarence*, of *Bristol*, in *Great Britain*, burthen, 105 tons, or thereabouts, now lying in the harbour of *Copenhagen*, having, on my passage from *St. Petersburg* to *London*, had the misfortune to run the said schooner brig on shore upon *Fosterborne Reef*;—Coast, *Sweden*, where she received considerable damage, and being unable to proceed in that state on her voyage, was compelled to put into this port to discharge and repair the damage:—To pay the charges and expenses attending the said repairs, unloading and re-loading, and putting the said ship in a state to proceed on her voyage, being loaded with a cargo of tallow, &c., I have borrowed and received from Messrs. *Belfour, Ellah, Rainals, & Co.*, of *Elsineur*, the sum of 1,077*l.* 17*s.* 9*d.* sterling, to pay for the above-mentioned repairs, together with labourage, commissions, and other adherent expenses, proceeding from the said misfortune, without which having been paid and done, the said schooner brig *Clarence* could not proceed on her destined voyage to *London*, and having received in hand the above-mentioned sum of 1,077*l.* 17*s.* 9*d.* sterling, which sum, with the due and ordinary annual rent of the same, from the date hereof to term of payment after-mentioned, I bind myself, my heirs, administrators, and assigns, particularly the above-mentioned schooner brig *Clarence*, together with all the apparel, tackle, boats, and stores of every kind, belonging to the said schooner brig; as well as her present freight and cargo, consisting of tallow, lathwood, &c.—thankfully to consent and pay to the said Messrs. *Belfour, Ellah, Rainals, & Co.*, aforesaid, or their attornies or assigns, the above-mentioned sum of 1,077*l.* 17*s.* 9*d.* sterling, with 12*l.* per cent. bottomry premium, all postages, and reasonable charges attending recovering the same:—and putting aside all and every detention of law, arbitration, or reference, I do further hereby bind myself, the said schooner brig *Clarence*, her freight and cargo of every kind, to the full and complete

payment of the said sum, with all charges thereon, *in eight days after my arrival* at the afore-mentioned port of *London*. And I do hereby make liable the said vessel, her freight and cargo, whether she do or do not arrive at the above-mentioned port of *London*, in preference to all other debts or claims; declaring hereby, that the said vessel is at present free from all incumbrances whatsoever; and that this pledge or *bottomry* has now, and must have preference to all other claims and charges, in any shape or manner, until such sum of 1,077*l.* 17*s.* 9*d.* sterling, with 12*l.* per cent. *bottomry premium*, making together 1,207*l.* 4*s.* 8*d.* sterling, with lawful interest, and all charges, are duly paid in money of *Great Britain*, or until the said Messrs. *Belfour, Ellah, Rainals, & Co.*, of *Elsineur*, or their assigns, have declared themselves in writing, fully satisfied with the security given for such payment,"—as by the said writing obligatory, reference being thereunto had, fully appears.

The plaintiffs then averred, that the said Messrs. *Belfour, Ellah, Rainals, & Co.*, in the said writing obligatory mentioned, did, at the time of the making of the said writing obligatory, to wit, on the day and year first aforesaid, at *London* aforesaid, as the agents of and on account and behalf, and at the request of the plaintiffs, lend and advance to the said *William Adams* the said sum of 1077*l.* 17*s.* 9*d.*, of the monies of them the plaintiffs, on *bottomry*, in manner and for the purposes, and on the conditions in the said writing obligatory specified:—and that the said writing obligatory was made and executed to the said Messrs. *Belfour, Ellah, Rainals, & Co.*, as such agents of the plaintiffs, and on their behalf, and for their use and benefit; whereof the said *William Adams* then and there had notice.

The plaintiffs then averred, that, after the making of the said writing obligatory, and after the lending and advancing of the said sum of 1,077*l.* 17*s.* 9*d.*, to wit, on the 11th *April*, 1823, aforesaid, at *London* aforesaid, the plain-

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tiff *Simonds*, on behalf of himself and *Loder*, (the other plaintiff), according to the usage and custom of merchants, caused to be made a certain writing or policy of assurance, containing therein, that the plaintiff *Simonds*, as well in his own name, as for and in the name and names of all and every other person or persons to whom the same did, might, or should appertain in part or in all, did make assurance, and cause himself and them, and every of them, to be insured, lost or not lost, at and from *Elsineur* to *London*, upon any kind of goods and merchandizes, and also upon the body, tackle, apparel, &c. &c., of and in the good ship or vessel called the *Clarence*, whereof was master, under God for that present voyage, *William Adams*, or whosoever else should go for master in the said ship; beginning the adventure upon the said goods and merchandizes from the loading thereof aboard the said ship, upon the said ship, &c.; and so should continue and endure during her abode there, upon the said ship, &c., and further, until the said ship, with all her ordnance, tackle, apparel, &c., and goods and merchandizes whatsoever, should be arrived at *London*, and until she had moored at anchor twenty-four hours in good safety; and upon the goods and merchandizes, until the same should be there discharged and safely landed. And it should be lawful for the said ship, &c., in that voyage, to proceed and sail to, and touch and stay at any ports or places whatsoever, without prejudice to that insurance;—the said ship, &c., goods and merchandizes, &c., for so much as concerned the assured, by agreement between the assured and assurers in that policy, were and should be valued at £——, *on bottomry, free from average, and without benefit of salvage*:—touching the adventures and perils which they the assurers were contented to bear, and did take upon them in that voyage, they were of the seas, men of war, &c. &c.; and so they the assurers were contented,

and did thereby promise and bind themselves, each one for his own part, their heirs, executors, and goods to the assured, their executors, administrators, and assigns, for the true performance of the premises, confessing themselves paid the consideration due unto them for that assurance, by the assured, at and after the rate of fifteen shillings and ninepence *per cent.*;—as by the said writing or policy of assurance, reference being thereunto had, will more fully appear; of all which said premises the defendant, afterwards, to wit, on &c. aforesaid, at *London* aforesaid, had notice:—And thereupon, afterwards, to wit, on &c. aforesaid, at *London* aforesaid, in consideration that the plaintiffs, at the special instance and request of the defendant, had then and there paid to him a large sum of money, to wit, the sum of 1*l.* 11*s.* 6*d.*, as a premium and reward for the assurance of 200*l.*, of and upon the premises in the said policy of assurance mentioned; and had then and there undertaken, and to the defendant faithfully promised to perform and fulfil all things in the said policy contained, on the part and behalf of the assured to be done, performed, and fulfilled; he, the defendant, undertook, and faithfully promised the plaintiffs, that he, the defendant, would become and be an assurer to the plaintiffs for the said sum of 200*l.*, of and upon the premises in the said policy mentioned, and would perform all things in the said policy contained on his part and behalf, as such assurer of the said sum of 200*l.*, to be performed and fulfilled:—and the defendant then and there became an assurer to the plaintiffs, and duly subscribed the policy as such assurer as aforesaid, to wit, at *London* aforesaid. The plaintiffs then averred, that the said ship or vessel in the said policy mentioned was the same ship or vessel in the said writing obligatory mentioned; and that the said sum of 200*l.* insured by the said policy was by way of insurance of part of the said sum of 1207*l.* 4*s.* 8*d.* in the said writing obligatory mentioned, and not any

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other or different money; and that the said bottomry in the said policy mentioned was the same bottomry in the said writing obligatory mentioned; and that heretofore, to wit, on the day and year last aforesaid, the said ship or vessel, with her said cargo, in the said writing obligatory mentioned, in the prosecution of her said voyage from *St. Petersburg* to *London*, in the writing obligatory mentioned, departed and set sail from *Copenhagen* aforesaid, and in the course of that voyage arrived at *Elsineur*, in the said policy mentioned; and that heretofore, to wit, on &c., the said ship and cargo were in good safety, to wit, at *Elsineur* therein mentioned; and that the plaintiffs, at the time of making the said insurance, and continually afterwards, until and at the time of the loss hereinafter mentioned, were interested in the said bottomry in the said policy of insurance mentioned, to a large value and amount, to wit, to the value and amount of all the monies by them ever insured or caused to be insured thereon; and that the said policy was made *on the said bottomry*, to and for the use and benefit and on the account of the plaintiffs, to wit, at *London* aforesaid. The plaintiffs then averred, that, afterwards, to wit, on &c., the said ship, with the said cargo on board thereof, in prosecution of her said voyage from *St. Petersburg*, departed and set sail from *Elsineur* aforesaid, on her said intended voyage in the said policy mentioned, and afterwards, and whilst she was proceeding on her said voyage, and before she arrived at *London* aforesaid, to wit, on &c., the said ship or vessel was, by and through the force of stormy and tempestuous weather, and by the perils and dangers of the seas, wrecked, stranded, driven on shore, and wholly lost, and never did proceed on the same or any other voyage, and never did arrive at *London* aforesaid, and the said cargo thereby became and was spoiled, damaged, destroyed, and wholly lost; and the said freight, also in the said writing obligatory mentioned, became and was, by reason of the premi-

ses, wholly lost, to wit, at *London* aforesaid; whereof the defendant afterwards, to wit, on &c., there had notice:—By reason whereof, the defendant then and there became and was liable to pay, and ought to have paid, the said sum of 200*l.*, so by him insured as aforesaid, according to the meaning and effect of the said writing or policy of assurance, and of his said promise and undertaking so by him made as aforesaid, to wit, at *London* aforesaid.

To this were added counts for money paid, money had and received, and on an account stated. The defendant demurred generally to the first count, and the plaintiffs joined in demurrer.

The case now came on for argument.

Mr. Serjeant *Wilde*, in support of the demurrer.—The bond set out in the declaration is not a bottomry bond; and in the policy the interest is declared to be on bottomry. But bottomry is a contract by which the owner of a ship borrows money to enable him to carry on the voyage, and pledges the keel or *bottom* of the ship as a security for the repayment; and the principle upon which bottomry is allowed, is, that the lender runs the risk of losing his principal and interest, and, therefore, that it is not usury to take more than the legal rate; for, if the ship be lost before her arrival at the end of her destined voyage, the party who makes the advance, loses the whole of his money. The main question then is, whether the subject matter of the insurance is correctly described in the policy and declaration. It is evident that it is not, because the bond is not only misdescribed, but there is no insurable interest unless the instrument be, in terms, a bottomry bond; and it does not contain the requisite ingredients to constitute a contract of bottomry. The master bound himself personally, and the schooner, her freight and cargo, for the repayment of the sum borrowed, with twelve *per cent.* bottomry premi-

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um, within eight days after his arrival in *London*; and he might have proceeded there by another course, or by a different ship; and the payment did not depend on his arrival in the brig *Clarence*; for, although she might have remained at *Elsineur*, or been lost on the homeward voyage, if the captain had arrived in *London*, the rights of the lenders would have attached at the expiration of eight days from the time of his arrival; and they might claim the payment of the sum advanced, and 12*l. per cent.* premium, according to the terms and stipulations contained in the bond. The subject matter of insurance must, at all events, be described with a reasonable degree of certainty in the declaration; and, here, it is alleged generally as being on bottomry, free from average, and without benefit of salvage; and, by the terms of the bond, the lenders of the money were to have the security of the ship, freight, and cargo, *whether the vessel arrived at London or not.* The premium of 12*l. per cent.* was excessive, and the contingency small, as it did not depend on the risk or perils of the voyage, or the arrival of the ship at her port of destination, but merely on the arrival of the master in *London.* The intention of the parties can only be collected from the terms of the contract, and by which the sum advanced was not put in hazard on the bottom of the vessel, or on her safe arrival at the port of *London.*

Mr. Serjeant *Stephen, contra.*—It must be admitted, that the principle upon which bottomry is allowed, is, that the lender runs the risk of losing his principal and interest. The only question then is—whether the bond set out in the declaration can be considered as a contract for bottomry.—By that instrument, the master bound himself to pay 12*l. per cent. bottomry premium*, and declared, that the pledge or *bottomry* must have preference to all other claims, until the sum borrowed, with the bottomry premium, was duly paid to the persons who made the advance. That, therefore, is conclusive to shew that the

parties intended that it should be a bottomry contract; and the rate of premium depended entirely upon the terms agreed on at the time the bond was given, and which vary according to the nature of the adventure. But, if the party advancing the money be subject to *any risk*, it is bottomry; and if the insurance be effected on bottomry, it is immaterial whether it be declared to be free from average, and without benefit of salvage. Mr. Justice *Blackstone* says (a), —“Bottomry is in the nature of a mortgage of a ship; when the owner takes up money to enable him to carry on his voyage, and pledges the keel or *bottom* of the ship, (*partem pro toto*), as a security for the re-payment. In which case it is understood, that if the ship be lost, the lender loses also his whole money; but, if it returns in safety, then he shall receive back his principal, and also the premium or interest agreed upon, however it may exceed the legal rate of interest.” That is the true definition: but the risks to which the lender exposes himself may be great or small; but they are generally those against which underwriters of a policy undertake to indemnify the assured. But this case falls within the terms of the preamble of the statute 6 Geo. 1, c. 18, in which it is recited, “that it has been a custom or usage, in this, as well as in other nations, for merchants or traders, who adventure their ships and merchandizes at sea, to borrow money, to be repaid upon the return or arrival of such ships, which kind of borrowing is commonly called taking up money on bottomry, in which cases, the lenders run a risk or hazard, *more or less*, of losing their principal; and are, therefore, allowed to contract for such interest or consideration-money, for the use or forbearance of the principal, as can be agreed upon between the borrowers and the lenders;” and here, according to the terms and effect of the bond, the sum advanced was to be repaid on the arrival of the ship at *London*, it being made by the captain as such, and to

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(a) 2 Bl. Com. Vol. 2, 457.

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whom the money was advanced as captain, and the lenders certainly ran some risk; and although the policy contains the condition free from average and without benefit of salvage, it is immaterial, and does not vitiate the policy. In *Busk v. Fearon* (a), although, in the introductory part of the condition of a *respondentia* bond, the money was stated to be lent on goods, yet it was explained in the subsequent part, and shewn to be only a pledge for the purpose of salvage: and Lord *Ellenborough* said (b)—“That the contract was not of universal nature and form, but depending upon the particular form of the instrument, varying in different countries.” Although, in *Joyce v. Williamson*, Lord *Mansfield* said (c)—“It is clear, that, by the law of *England*, there is neither average nor salvage upon a bottomry bond;” yet here, the bond was executed in *Denmark*, and was conformable to the law of that country; and in *Walpole v. Ewer* (d), Lord *Kenyon* was of opinion, that, by the law of *Denmark*, lenders upon *respondentia* are liable to average; and that as they are bound to contribute according to the amount of their interest, the insurer must answer to them;—the underwriters being bound by the law of the country to which the contract relates. The ordinances of *France* expressly declare, that lenders on bottomry shall be subject to general or gross average, in the same manner as insurers are upon policies of insurance. The statute 19 *Geo. 2*, c. 37, allows the benefit of salvage to lenders upon ships or goods going to or from the *East Indies*. In *Abbott on Shipping* (e) there is a form of a bottomry bill or bond, which is nearly similar in terms to the present; and, although there the master bound himself for payment of the sum advanced, within thirty days next after the safe arrival of the ship, yet the condition of the bond in this case is to the same effect, as it is a mere substitution of the master for the ship; and the words, “after my arrival,” do not mean,

(a) 4 East, 319.

Edit. 564.

(b) Id. 335.

(d) Ib. 565.

(c) Park on Insurance, 6th

(e) 4th Edit. Appendix, No. 3.

the personal arrival of the master, but his arrival in his character of captain, at the termination of the voyage in which he was then engaged; and, even if it depended on the personal arrival of the captain alone, it is such a contingency as to place the money of the lenders at hazard; and any degree of risk, however slight, is sufficient to constitute a contract of bottomry. The whole of the instrument must be looked at; and as it not only purports to be a bottomry contract, but the parties themselves have so expressed it, the mere *personal arrival* of the captain is not the rational construction to be put upon it; for, he contracted as captain, and thereby connected himself with the vessel and her consequent arrival at her destined port; and if he had died in the course of the voyage, and the ship had got safe to *London*, it is quite clear that the lenders would be entitled to recover on the bond. The interest, therefore, is not only an insurable interest, but is properly described as an interest on bottomry, in the policy and declaration.

Mr. Serjeant *Wilde*, in reply.—In order to constitute a contract of bottomry, the advance must be made on the keel or bottom of the ship, and the re-payment can only depend upon her safe arrival at the destined port, as the lender sustains all the hazard of the voyage. Mr. Justice *Park*, in his valuable treatise on insurance, says (a)—“The true principle, upon which the lender shall be paid his principal, and the stipulated interest due upon it is allowed, is not merely the great profit and convenience of trade, but the risk which the lender runs of losing both principal and interest, for he runs the contingency of winds, seas, and enemies. It is, therefore, of the essence of a contract of bottomry, that the lender runs the risk of the voyage, and that both principal and interest be at hazard. Here, the

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(a) 6th Edit. 558.

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lenders did not run the risk of the voyage; for, if the master arrived in *London*, the bond might be enforced, whether the ship arrived there or not. The nature and quality of the instrument must be looked at; and as it is not a bottomry bond in substance or in terms, it is mis-described as such in the declaration; so is the subject matter of the insurance: and the statute 19 *Geo. 2*, c. 37, is confined to ships bound to or from the *East Indies*, and, therefore, cannot apply to an ordinary contract of bottomry. The form of the bottomry bill, in the Appendix to *Abbott on Shipping*, applies to an *East India* voyage, viz. from *Bengal* to *London*, and the sum advanced was to be repaid on the *safe arrival of the ship*; but here, if the vessel had been sold at *Elseneur*, or had been lost on her voyage, if the captain arrived in *London*, the lenders might call for repayment of the sum advanced, with twelve *per cent.* premium; the contract is void, as it was a mere cover for usury. Although the case of *Walpole v. Ewer* has been relied on, to shew, that, by the law of *Denmark*, where the bond in question was made and executed, lenders upon bottomry are liable to average; yet, in *Power v. Whitmore* (a), it was held, that the question as to what shall be a general average within the meaning of a policy, must be decided by ascertaining what is accounted such by the law of this country; unless it can be shewn, that, at the place where the adventure is to determine, and where, therefore, a general average would be demandable, it is the known and invariable usage of merchants to treat losses as the subjects of general average, which, by the laws of *England*, are not so.

Lord Chief Justice TINDAL.—I think that the defendant is entitled to judgment. When he underwrote the policy, he entered into a contract in which the interest of the

(a) 4 *Mau. & Selw.* 141.

assured was described to be an interest *on bottomry*, free from average and without benefit of salvage. He therefore naturally expected that it would be what is ordinarily termed bottomry interest, free from average; but the premium payable on the sum advanced is falsely described as bottomry premium in the bond; neither was the plaintiffs' interest in the subject matter of the insurance an interest on bottomry. The bond, therefore, and the insurable interest, are mis-described in the declaration; for the instrument varies from a bottomry contract in this most essential particular, *viz.* that the claim of the lenders of the money does not depend upon the risk or perils of the voyage, as the vessel, freight, and cargo were to be liable, whether she arrived at *London* or not. This, therefore, is not an ordinary bottomry contract, and is improperly described as such in the declaration.

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Mr. Justice PARK.—In *Glover v. Black* (a), it was decided, after full and mature consideration, that although bottomry may be the subject of insurance, it must be particularly mentioned and specified in the policy, and expressed to be bottomry interest; for that, under a general insurance on goods, the party insured cannot recover money lent on bottomry. Here, the interest of the assured is described to be on bottomry, free from average, and without benefit of salvage; and the underwriter must have considered that he was insuring on bottomry in the ordinary sense of the word. But when the bond is looked at, it is quite clear, that it is not a contract for bottomry or *respondentia*, for the reasons assigned by my Lord Chief Justice. With respect to the condition as to general average, when the case of *Walpole v. Ewer* was decided, Lord *Kenyon* was new in his office. Besides, it is but a mere *Nisi Prius* decision; and in *Newman v. Cazalet* (b), Mr. Justice *Buller* seems to have

(a) 3 Burr. 1394.

(b) Park on Insurance, 566, n.

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doubted the general rule as afterwards stated by Lord *Kenyon*, and relied upon the usage which was proved; for he said, that, but for the usage, the plaintiff would have failed on the general law; and that learned Judge had a full knowledge of insurance law, as he was brought up at the feet of Lord *Mansfield*, from whom the first principles of that branch of our jurisprudence emanated; and in *Power v. Whitmore*, Mr. *Abbott*, now Lord *Tenterden*, in the course of his argument, insisted, that the insurance being to a foreign country, *viz. Spain*, the underwriter was bound by the law of the country to which the contract relates; that is, to indemnify the assured, if he is obliged by the law of that country to contribute to a general average; and he relied on *Walpole v. Ewer*, and *Newman v. Cazalet*; yet Lord *Ellenborough*, in delivering the judgment of the Court, after time taken for consideration, said, that the contract must be governed, in point of construction, by the law of *England*, where it was framed, unless the parties are to be understood as having contracted on the foot of some other known general usage amongst merchants relative to the same subject, and shewn to have obtained in the country where, by the terms of the contract, the adventure is made to determine, *viz. Lisbon*; and where a general average (if such should under the events of the voyage be claimed) would of course come to be demandable." Although his Lordship did not advert to *Walpole v. Ewer*, in terms, yet it was referred to in the course of the argument, and the general rule there laid down by Lord *Kenyon*, qualified, and which was before doubted by Mr. Justice *Buller* in *Newman v. Cazalet*.

Mr. Justice BURROUGH.—I am clearly of opinion, that the captain had no authority to borrow money on the terms mentioned in the bond, and that the instrument is void on the face of it, as it was neither a bottomry nor a *respondentia* contract, as it did not depend on the

safe arrival of the vessel insured at her port of destination.

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Mr. Justice GASELEE concurring—

Judgment for the defendant.

ANN HETHERINGTON v. WILLIAM GRAHAM.

Monday,
July 6th.

THIS was a writ of dower. The demandant, *Ann Hetherington*, widow, in her count, demanded against the tenant, the third part of certain messuages, &c., as the dower of the demandant, of the endowment of her late husband, deceased, whereof she hath nothing, &c. Plea in bar, that the demandant ought not to have dower, because she, in the life-time of her late husband, and during her coverture with, and whilst she was his wife, voluntarily, and of her own accord, left her husband, and from thence, until, and at the time of his death, voluntarily, and of her own accord, lived away from him, and during her coverture with her said husband, continually, until the death of one *William Coulson*, of her own accord, and without the licence or consent, and against the will of her husband, lived away from her said husband in adultery with the said *William Coulson*. The tenant also alleged, that the husband was not, at any time after the demandant left his house, or after she lived from him in adultery with the said *William Coulson*, voluntarily or in any manner reconciled to her. And this &c., wherefore, &c.

If a woman leave her husband with her own free will, and afterwards lives in adultery, she forfeits her claim to dower.

A plea in bar to a writ of dower, *unde nihil habet*, alleged, that the wife, during her coverture, voluntarily left her husband, and, without his consent, lived away from him in adultery with *W. C.*:—*Held*, sufficient, without alleging that she left with *W. C.* willingly, and that she had been convicted of adultery.

Replication—That although true it was, that the demandant voluntarily, and of her own accord, left her husband, yet that she left him with his licence and consent for that purpose granted, and separated and parted from him; and

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that such separation continued with their mutual consent, until the death of the husband; and, that if any act of adultery took place, the same took place after such separation and parting from her husband, and during the time of such separation by such their mutual consent.

Rejoinder—That the demandant, in the life-time of her husband, and during her coverture with him, voluntarily, and of her own accord, left him; and, without his licence or consent, lived away from him in adultery with the said *William Coulson*.

To this rejoinder the demandant demurred generally, and the tenant joined in demurrer.

Mr. Serjeant *Wilde*, in support of the demurrer.—The question is—whether the facts alleged by the tenant, in his plea in bar, are a sufficient answer to the demandant's claim of dower. This will depend on the construction of the statute of *Westminster* the 2nd (13 *Edw.* 1, c. 34) (a). Previously to that statute, the adultery of the wife, being an offence of ecclesiastical cognizance only, was no forfeiture of dower at common law. It is difficult to ascertain the principle on which the statute was founded, for, if the wife commit adultery with the consent of her husband, her dower is forfeited, yet a reconciliation by the husband restores the right. In *Fitzherbert's Natura Brevium*, it is said (b), “if the wife do elope from her husband, and remain with the adulterer, she shall lose her dower; but if she remain in adultery upon the husband's lands or te-

(a) By which it is provided, that, “if a wife willingly leave her husband, and go away, and continue with her adulterer, she shall be barred for ever of action to demand her dower, that she ought to have of her husband's lands, if

she be convict thereupon; except that her husband willingly, and without coercion of the church, reconcile her, and suffer her to dwell with him; in which case she shall be restored to her action.”

(b) 150, 8th Edit. Quarto, 352.

nements, she shall have dower, because the same is not an elopement; and the *First Institute* (a), and *Perkins* (b), are referred to as authorities in support of that position, Lord *Coke* says (c), "if the wife elope from her husband, that is, if the wife leave her husband, and *goeth away* and *tarrieth with* her adulterer, she shall lose her dower until her husband willingly, without coercion ecclesiastical, be reconciled unto her and permit her to cohabit with him; and if she goeth *willingly with or to* the avowtrier, this is a departure and tarrying, albeit she remaineth not continually with the avowtrier." The statute therefore requires additional circumstances to those stated in the plea, to deprive the wife of her claim to dower, *viz.* that she went away *with* her adulterer *willingly*, and that she *continued* or tarried with him; and here, it is merely alleged, that the demandant voluntarily left her husband, and lived away from him; but it does not appear that she left *with Coulson*, or that she had committed adultery at the time she quitted her husband; and if she did not leave with the adulterer, but left her husband with his assent, subsequent adultery would not of itself occasion a forfeiture of dower; and the demandant has alleged in her replication, that if any act of adultery took place, it was after the separation from her husband, and during the period of such separation by their mutual consent. In *Viner's Abridgment*, it is said (d), "if the wife elope from her husband with another man, and *continues in adultery* with him, without being reconciled to her husband, she shall lose her dower. The same law, if she elope *with the adulterer*, and is not reconciled, though she does not stay with the adulterer. So, if she be reconciled to her husband by the coercion of the holy church. So, if the wife

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(a) 32, b.

(b) 170, D.

(c) Co. Lit. 32, b.

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(d) Tit. Dower, P. Vol. 9, page 240.

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elope with her good will, and stays with the adulterer against her will, she shall lose her dower. But if she be ravished, and stays with the adulterer against her will, or if, after elopement, she be reconciled to her husband, of his free will, without coercion of church, she shall have her dower." But there is no case where the wife has forfeited her dower, unless she has left her husband's house *willingly*, and *with the adulterer*. In *Haworth v. Herbert* (a), the plea stated that the wife, of her own accord, left her husband, and went away from him *with one Matthew Rochley*, and continued with him in adultery. In *Rastell's Entries* (b), where the elopement of the wife was pleaded in bar, it was alleged, that she *sponte* left her husband with the adulterer. The same form of plea is to be found in *Robinson's Entries* (c), and in the *Liber Intractionum* (d); but, as the statute creates a forfeiture of dower, it must receive a strict construction; and therefore, in *Kent v. Whitby* (e), where an *Irish* statute (6 *Annæ*) enacted, that, if a woman, by subtle means, prevail on the son and heir of any person having lands or personal estate of a certain value to marry her, she is rendered incapable of demanding any dower out of the estate of her husband; and the statute being pleaded to a writ of dower—it was held, that the Jury must expressly find that subtle means were used, for that they were not to be presumed from the circumstances of the marriage being private, without the father's consent. *Lastly*, the wife cannot be barred from claiming her dower, unless she has eloped with the adulterer, *and be convict thereupon*. It is the duty of the husband, on his wife's leaving him, to make immediate inquiry, and, if he find her with the adulterer, to cause her to be proceeded against in the Spiritual Court, and the conviction to be recorded; and although Lord *Coke*, in treating of

(a) 2 Dyer, 106, b.
 (b) 230, s. 9.
 (c) 260.

(d) Fol. 20.
 (e) 4 Brown's Parl. Cas. 362.

this branch of the statute, omits to notice the words, *si super hoc convincatur*, and states (a), that if the wife goeth away with her husband's agreement and consent with *A. B.*, if after *A. B.* commit adultery with her, and she remain with him without reconciliation, she shall be barred of her dower; yet here, the plea does not allege that the demandant left with *Coulson*, or that she had committed adultery before she quitted her husband's house.

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Mr. Serjeant *Jones, contra.*—The plea in question is a good plea in bar to the demandant's claim to dower. The statute of *Westminster 2nd*, c. 34, expressly enacts, that if a wife willingly leave her husband, and go away with an adulterer, she shall lose her dower, unless her husband be voluntarily reconciled to her, in which case she shall be restored to her action. The question then is—whether the demandant, having separated from her husband by mutual consent, previously to her cohabitation with *Coulson*, she is thereby debarred of her claim to dower. The separation of the wife from the husband is a mere matter of fact, and is stated in the most general terms in the replication. It does not appear, whether the separation took place by a decree of the Ecclesiastical Court, or by deed, or whether it was for the lives of the parties, or for a term; and it might have been for one day only. The statute in question contains five branches, the three first of which relate to ravishment of women by force; and, Lord *Coke*, in commenting upon the fourth, and on which the present question arises, says (b)—“Albeit, the words of this branch be in the conjunctive, yet if the woman be taken away not *sponste*, but against her will, and after consent, and remain with the adulterer without being reconciled, &c. she shall lose her dower; for the cause of the bar of her dower is

(a) 2nd Instit. 435.

(b) Ibid.

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not the manner of the going away, but the remaining with the adulterer in avowtry, without reconciliation, that is the bar of the dower." Although the words of the statute are, *Si sponte reliquerit virum suum, et abierit, et moretur cum adultero*, yet the sum and substance of the offence is the adulterous cohabitation; and Lord *Coke*, in commenting on the words, "*moretur cum adultero*," says (b)—"Albeit, the wife doth not continually remain in adultery with the adulterer, yet if she be with him and commit adultery, it is a tarrying within the statute:—also, if she once remain with the adulterer in avowtry, and after he keepeth her *against* her will; or if the avowterer turn her away, yet she shall be said *morari cum adultero*, within the statute." Whether, therefore, she remain with the adulterer or not, or he keep her against her will, if she elope with him, she forfeits her right to dower, unless she be afterwards reconciled to her husband; and Lord *Coke* expressly says, that the remaining with the adulterer in avowtry, without reconciliation to her husband, is a bar of dower; and he quotes *Paynel's* case, where a man by deed granted his wife with her goods to another, by force of which the wife eloped and lived with the grantee afterwards, during the life-time of her husband; and it was held, that she should, notwithstanding, lose her dower, because she lived in adultery with the grantee, although she married him after her husband's death. There, the manor out of which the wife demanded her dowry, being in the seisin of the King, the Attorney-General pleaded in bar, that she ought not to be endowed, because she left her husband in his life-time, and lived as an adulteress with Sir *William Paynel*, without alleging that she left *with him*. In *Coot v. Berty* (a), where the elopement of the wife was pleaded in bar to a writ of dower, and she replied that her husband had bargained and sold her to the adulterer, the replication was

(a) 2nd Instit. 436.

(b) 12 Mod. 232.

held bad. The mere separation of man and wife may arise from a variety of causes, or its existence may be of short duration; but the principle on which the forfeiture of dower attaches, by the statute of *Westminster* the 2nd, is, the protection of public morals, and the punishment of the delinquency of the wife; and the concurrence or conjunction of the three acts enumerated in the statute, *viz.* the wife's *willingly* leaving her husband *with* the adulterer, and *remaining* with him, are not necessary in order to bar the wife of her right to dower. In *Govier v. Hancock* (a), it was held, that a husband is not bound to receive or to support his wife after she had committed adultery, although he had before committed adultery himself, and turned her out of doors without any imputation on her conduct; and Lord *Kenyon* said—"That though *the precise* case did not appear to have been controverted before, it must be governed by the same principle on which it had been determined that the husband is not liable in cases where the wife goes away with an adulterer. That this was not a modern rule, but was mentioned by Lord *Coke* (b)—"That if a wife go away with an adulterer she loses her dower." Although, therefore, the law would protect an innocent woman, if turned out of doors by her husband, yet it withdraws such protection if she afterwards commit adultery. And in *Chambers v. Caulfield* (c), where husband and wife entered into a deed, with a provision, that, in a certain event, and upon the consent of trustees, the wife should be permitted to live separate, and she did so, but without the consent of the trustees, and afterwards committed adultery, it was held that the husband might sue the adulterer in an action for criminal conversation. With respect to the words in the statute, "if she be convict thereupon," it has no where been said, that the wife must be convicted by a sentence

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(a) 6 Term Rep. 603.

(b) Co. Lit. 32 a.

(c) 6 East, 244.

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or decree of the Spiritual Court. These words must be taken to apply to the finding of the fact of adultery, which may be done by the inquiry of the husband, or may be raised on the face of the record by a plea in bar—and there is no entry in any of the old books, where any conviction of the wife has been alleged, nor was it considered as necessary by Lord *Coke*; and no commentator on this branch of the statute has made any allusion to it.

Mr. Serjeant *Wilde* in reply.—A single act of adultery will not create a forfeiture of dower, either by the words of the statute or the construction which has been put upon it by Lord *Coke* and other commentators. The words are, “*uxor si sponte reliquerit virum suum.*” She must therefore go *willingly* with the adulterer, and her consent overrides the whole of the sentence; and although Lord *Coke* says, “that if she does not remain with the adulterer, or, having once committed adultery, he keeps her against her will, she shall be said *morari cum adultero*, within the meaning of the act; yet he quotes no authority in support of that doctrine. Although it has been said, that the object of the statute was to protect public morals, yet it appears, that if the husband consent to receive his wife back again, or a reconciliation be effected between them, although she had committed adultery, she would not forfeit her right to dower. So, if the husband grant his wife with her goods, she will not lose her dower. But, the material fact to be alleged and proved in this case is, that the demandant left her husband *with the adulterer*, and that is evident from all the old books of entries, as well as the form of the plea in *Dyer*; and no doubt Lord *Coke* thought it necessary, as, from his silence on the subject, it must be assumed, that it was the uniform and accustomed course of pleading; and although it has been said, that the words, “if she be convict,” must be taken to apply to the mere finding of the fact of adultery; yet,

the original words are "*si super hoc convincatur*," which must mean that the wife be thereupon convicted by a decree of the Spiritual Court—upon which sentence of condemnation might immediately follow.

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Cur. adv. vult.

Lord Chief Justice TINDAL now delivered the judgment of the Court as follows:—The demandant counted upon a writ of dower, *unde nihil habet*. The tenant pleaded in bar, that the demandant, in the life-time of her late husband, and during her coverture with him, voluntarily left him, and from thence, until the time of his death, voluntarily lived away from him, and during her coverture with her husband, continually, until the death of one *Coulson*, of her own accord, and without the licence or consent, and against the will of her husband, lived away from him in adultery with *Coulson*; and that the husband was not at any time after the demandant left his house, or after she lived in adultery with *Coulson*, voluntarily, or in any manner, reconciled to her. The demandant, in her replication, alleged, that although true it was, that she voluntarily and of her own accord, left her husband, yet, that she left him with his consent for that purpose granted, and separated from him; and that such separation continued with their mutual consent, until the death of the husband; and that if any act of adultery took place, it was after her separation from her husband, and during the period of such separation by their mutual consent. The tenant, in his rejoinder, re-asserted the fact, that the demandant, of her own accord, and without the licence or consent of the husband, lived away from him in adultery with *Coulson*. To this rejoinder the demandant demurred generally, and the tenant joined in demurrer.

The question raised upon these pleadings is, whether, under the statute 13 *Edw. 1*, c. 34, commonly called the statute of *Westminster* the second, the committing an act

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of adultery, and continuing with the adulterer, is a bar to the wife's right to dower, where she has previously left her husband with his consent, and is living apart from him with such consent at the time of the adultery; or whether it is necessary, in order to satisfy the words of the statute, that the original leaving of her husband should be a leaving *with the adulterer*, by his means or persuasion. That the adultery of the wife was no bar of the wife's dower at common law, is expressly laid down by Lord *Coke* in his reading on that statute in the Second *Institute* (a). Indeed, it could not have been otherwise, as adultery is an offence of ecclesiastical jurisdiction only, and of which the Courts of common law took no cognizance. As well, however, for the purpose of preventing that offence, but more probably with the view of protecting the heir against the danger of introducing a supposititious offspring into the family (b), it is enacted by the 34th chapter of the statute 13 *Edw.* 1, "that, if a wife willingly leave her husband, and go away, and continue with her advowtrier, she shall be barred for ever of an action to demand her dower, that she ought to have of her husband's lands, if she be convict thereupon;"—except in an event which has not happened in this case, and to which it is therefore unnecessary to revert. It is somewhat singular, that throughout the whole of this long statute, consisting of fifty chapters, this is the only one in the old law *French*, all the others being in *Latin*; and even this chapter changes from the law *French* to *Latin*, just at the place where this subject begins. The chapter, however, after making a distinction between the carrying away women with force and without force, and enacting a punishment for those offences, provides for the case now before the Court, *viz.* that of the wife willingly leaving her husband, and going away, and continuing with her adulterer, in the

(a) Page 435.

(b) See *Sydney v. Sydney*, 3 Peere Wms. 276.

words above stated. It has been contended for the demandant, that each part of the description of the offence contained in the statute must be taken to be cumulative, so that the dower is not barred unless three things concur, *viz.* unless the wife has left her husband *willingly with the adulterer*, has gone away with him, and has also continued with him: whilst, on the part of the tenant, it has been insisted, that it is sufficient to bring the case within the terms of the statute, if the wife has, of her own consent, left the society of her husband, and, after she has so left him, committed the act of adultery; and the Court is of that opinion. It may be admitted, as the fact is, that in all the ancient entries and old precedents, the leaving of the husband by the wife is alleged to have been *with the adulterer*—as in *Liber Intrationum* (a), *Rastell's Entries* (b), and *Dyer* (c). But we think that this is not conclusive on the point, for, as there can be no doubt but that a case is within the statute, where all these circumstances concur, so the pleader would of course insert them where the facts of the particular case warranted their introduction. And on the contrary, there is a direct authority, that *all the circumstances* mentioned in the statute need not concur in form, provided they do in substance; for, Lord *Coke* lays it down (d), that “Albeit the words of this branch be in the conjunctive, yet, if the woman be taken away, not *sponte*, but against her will, and *after consent*, and remain with the adulterer without being reconciled, &c., she shall lose her dower; for the cause of the bar of her dower is *not the manner of the going away*, but the remaining with the adulterer in avowtry, without reconciliation, that is the bar of the dower.” And this appears more evident by the record in the case of

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(a) Fol. 20.

(b) 230.

(c) Vol. 2, 106 b.

(d) 2nd Instit. 435.

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Paynel and Wife, demandants (a), where, to a demand of the third part of a manor, as the dower of the wife, after the death of *John de Camoys*, her first husband, the plea stated, that she ought not to be endowed, because she left her husband in his life-time, and lived as an adulteress with Sir *William Paynel*, and was not reconciled to her husband before his death, and the replication took issue, that she did not live as an adulteress with the said Sir *William*, but as his wife, and it was adjudged that she ought not to be endowed—she was, therefore, barred of her dower, although there was no allegation that she left with the adulterer. It ought not to be forgotten, that *Britton*, whose book was published immediately after the framing of this statute, in treating of a writ of dower brought against the heir and his guardian, says (b): “The heir may say she hath forfeited dower of her husband, by her adultery, for she went from her husband to another bed after she had married him, and so forfeited her dower.” Now, here, no mention is made of a leaving of the husband, either willingly or with any particular person, but the plea only states in substance, that the wife was living apart from her husband in adultery. The authorities above referred to place the forfeiture of the dower upon the fact of the wife’s leaving the husband, and living from him in adultery, and not upon the circumstances attending the elopement; and as we think that good sense and reason concur with these authorities, we hold the proper construction of the statute to be, what the words will warrant, viz. that if a woman leaves her husband, with her own free will, and afterwards lives in adultery, the dower is forfeited. The plea in bar is, therefore, sufficient, and the tenant is entitled to judgment.

Judgment for the tenant.

(a) 2nd Instit. 435; S. C. 2 Dyer, 106 b.

(b) Page 258 b.

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DOE, on the joint and several demises of HARROP and TANNER;—PETTY, MULES, and WOODLEY;—CLARKE;—and HAMMOND, & COOKE and NEWTON.

Monday,
July 6th.

THIS was an action of ejectment. The declaration contained several demises. The *first*, by Harrop and Tanner, trustees named in a deed of separation, between *Mr Kenzie* and his wife, in *March*, 1802. The *second* was laid in the names of *Petty, Mules, and Woodley*, trustees named in the will of a *Mrs. Middleditch*, afterwards *Mrs. Mr Kenzie*. The *third*, in the name of *Clarke*, as surviving trustee, under a deed of assignment of the 25th *March*, 1794, by which the premises in question were mortgaged by the owner, *Mr. Middleditch*, to *Charles Hammond*, for the residue of a term of six hundred years, created in 1793. And the *fourth*, was laid in the name of *Elton Hammond*, who was the personal representative and trustee of *Hammond*, the mortgagee.

The defendants were in possession of the premises.

At the trial, before *Mr. Justice Burrough*, at *Exeter*, at the Spring Assizes, 1824, the Jury found a verdict for the plaintiff, as against the defendant *Cooke*, as to so much of the premises as were in his possession; and for the defendant *Newton*:—and in *Easter Term*, 1824, upon a motion made for leave to set aside the verdict for the plaintiff, and to enter a nonsuit, on the ground that the legal estate was not in any of the lessors of the plaintiff, but in two persons, named *Mangles* and *Taddy*, trustees under the will of *Mr. Middleditch*, and no demise was laid by them in the declaration, the Court directed the facts to be stated in a special case, which were in substance as follow:

The premises in question formed part of a manor, and, amongst others, were conveyed by indentures of lease

At the trial of an action of ejectment, commenced in 1824, the defendant proved, that, in 1802, the Court of Chancery decreed that monies should be raised by sale or mortgage of certain premises, which were assigned to the mortgagee for the residue of a term of 600 years, created in 1794, and that what was found to be due to him, should be paid to him. No evidence was adduced by the defendant of any further proceedings in the Chancery suit, nor did he shew any title to the premises, but merely proved that some sales took place under the decree, and that he had purchased certain lots, but which did not appear to form any part of the premises sought to be recovered:—*Held*, that these circumstances were not sufficient to found a presumption, that the mort-

gage term had been surrendered to the owner of the inheritance, as such presumption can only arise where a title has been shewn by the party who calls for the presumption, or the possession is shewn to have been consistent with the existence of the surrender required to be presumed.

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and release, of *August* 1793, to the use of *Lubbock* and *Clarke*, for the term of six hundred years, upon trust, by mortgage or sale, to raise the sum of 15,000*l.*, or so much thereof as Mr. *Middleditch* should, by deed or will, direct and appoint, and subject thereto, to certain uses in the deed of release mentioned, with the ultimate remainder to the use of Mr. *Middleditch* and his heirs and assigns, in fee. The deed also contained a proviso, that, after the death of *Middleditch*, and full payment of the said sum of 15,000*l.*, or any monies which might be raised under and by virtue of the deeds of lease and release, and of the costs and expenses of the trustees in raising the same, the said term of six hundred years, or so much of it as remained unexpired, should cease.

By a deed of assignment, of the 25th *March*, 1794, between *Lubbock* and *Clarke*, the trustees, of the first part; *Middleditch*, of the second part; and *Charles Hammond*, of the third part; after reciting the indentures of lease and release of *August*, 1793, and that 6,000*l.* had been paid to *Lubbock* and *Clarke*, by *Hammond*, with the knowledge and privity of *Middleditch*, they, by his direction, assigned the premises in question to *Hammond*, to hold to him for the residue of the said term of six hundred years, subject to a proviso for redemption, on payment of the said sum of 6,000*l.*, and interest.

In *November*, 1798, Mr. *Middleditch* made his will, and by which he devised all his real estates to *Mangles* and *Taddy*, and their heirs, upon trust, to sell so much thereof as was necessary to pay funeral expenses, all monies due upon mortgage of any part of his estates, and all his debts; and, after bequeathing several legacies, he left the overplus or residue in trust for the separate use of his wife, her heirs and assigns, subject to the payment of a certain annuity mentioned in the will. Mr. *Middleditch* died in 1799.

The defendant *Cooke* proved, that, in 1799, a suit was instituted in the High Court of *Chancery*, for carrying the will of Mr. *Middleditch* into effect, to which suit *Mangles*

and *Taddy*, and the heir-at-law of Mr. *Middleditch*, and *Charles Hammond*, the mortgagee, were parties; and by a decretal order of the 26th *January*, 1801, the will was established, and the Master was to report what sums were due on mortgage; and by another order, in 1802, it was decreed, among other things, that the devisees should raise money by sale or mortgage of the estate (including the premises in question), and that what was found to be due on *Charles Hammond's* mortgage should be paid to him, and all further directions and costs were reserved until after the sale of the estate. No evidence was given as to any further proceedings in the suit in *Chancery*, nor of *Cooke's* title to the premises sought to be recovered, although he proved that certain sales took place under the last decree, and that he bought various lots, but he did not shew that they formed any part of the premises sought to be recovered by this action. Mrs. *Middleditch*, by her will, conveyed all her estates in trust to *Petty*, *Mules*, and *Woodley*, for certain uses mentioned in the will, and afterwards intermarried with Mr. *M'Kensie*. She died without issue, in 1819.

The question for the opinion of the Court was—Whether, under the circumstances, the Jury ought not to have presumed that the sum of 6,000*l.*, advanced by *Hammond*, in *March*, 1794, had been repaid; and that the term of six hundred years had either ceased under the proviso contained in the deed of release of 1793, or been surrendered to the owners of the inheritance?

The case now came on for argument.

Mr. Serjeant *Wilde*, for the lessors of the plaintiff.—The defendant *Cooke* insists, that neither of the demises in the declaration can be supported, as the legal estate in the premises in question is vested in *Mangles* and *Taddy*, the trustees under Mr. *Middleditch's* will; and that the legal estate is in them by operation of law, as, under the circumstances, the Court must presume that the mortgage

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term assigned to *Hammond* had either ceased or been surrendered to the owners of the fee. The proviso, or clause of *cesser*, in the deed of release of *August*, 1793, does not apply to the facts now before the Court, but only to that portion of the estate which was to be in the disposition of the trustees. To raise the presumption that the term assigned to the mortgagee had either ceased or been surrendered, it was incumbent on the defendant to have shewn that the sum advanced by *Hammond* was repaid, for he could not call on the lessors of the plaintiff to prove that it had not been paid. The defendant is not the owner of the inheritance, nor does he claim under him, but was merely a party in possession and without even a colour of title. There is a wide distinction where a claim is in support of the owner of the inheritance, or is adverse to him; and here, all the parties beneficially interested are the lessors of the plaintiff on the record, whose rights either emanate from the owners of the inheritance, or the personal representative of the mortgagee. The mortgage deed, of 1794, was produced at the trial, which took place in 1824, and it would be too much to presume that the mortgage was satisfied, or that the term had been surrendered. The doctrine, with regard to the presumption of the surrender of a term, is of modern introduction, and Judges, both at law and in equity, have, lately, been much inclined against such doctrine. In *Cholmondeley v. Clinton* (a), by a deed of 1704, a term of two hundred years was created, with a proviso for the cesser of the term, which, as Lord *Eldon* observes, was a *cesser* of the interest which the term creates, and, said his Lordship (b), "I conceive that such a term, whether there was any intention that it should or should not attend the inheritance, would be a term held in trust to attend the inheritance, protecting the equities of all who had equities during the existence of that term; all the estates, to a certain extent, that is, dur-

(a) Sugden's Vendor and Purchaser, 6th Edit. 425.

(b) *Ib.* 426.

ing the duration of the term, would be equitable estates, but protecting them all according to the due course, and order, and priority in which they existed, and according to their equities;" and in giving judgment in that case upon a subsequent hearing at the *Rolls*, Sir *Thomas Plumer* intimated a strong opinion against the doctrine of presumption in such a case (a), and said—"That the presumption of the surrender of an old term, without sufficient ground, is striking at the settled doctrine of centuries, shaking the land-marks of real property, and rendering insecure the title of every purchaser in the kingdom." It must, however, be admitted, that terms may be presumed to be surrendered by collateral circumstances, but such presumption cannot arise where the title deeds are in the possession of a mortgagee or his representatives. Unless, in this case, the Jury were bound to presume that the term assigned to *Hammond* had either ceased, or been surrendered to the owners of the inheritance, the defendant could have had no legal defence, and the Judge should have directed the Jury accordingly. Although, in *Doe d. Burdett v. Wrighte* (b), where a term of one thousand years was created by deed in 1717, and assigned in 1735, to raise an annuity, and subject thereto, to attend the inheritance; and the grantee having died in 1741, and the estate having remained undisturbed in the hands of the owner of the inheritance and her devisee from the time the annuity was granted, to 1813, without any notice having been in the mean time taken of the term, except, that, in 1801, the devisee, in whose possession the deeds creating the term were found, covenanted to produce them when called for: it was held, that the Jury were warranted to presume a surrender of the term;—yet the action was brought by a person claiming as heir-at-law, against a person who also claimed as heir: and Mr. Justice *Bayley* said (c)—"The principle upon which the Courts proceed in these cases is,

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(a) 2 Jac. & Walk. 158-9.

(b) 2 Barn. & Ald. 710.

(c) Ib. 719.

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that they will presume a surrender, where it is for the interest of the owner of the inheritance that the term should be considered as surrendered;" and Mr. Justice *Holroyd* added (a), "that there were strong grounds upon which such presumption might be made, as it was clearly *for the interest of the owner of the inheritance* that the term should be surrendered." Here, however, the defendants' claim is adverse to the interest of the owner of the inheritance; and, although, in *Doe d. Putland v. Hilder* (b), where a term of years was created in 1762, and assigned over to a trustee in 1779, to attend the inheritance; and, in 1814, the owner of the inheritance executed a marriage settlement, and, in 1816, conveyed his life interest in the estate to a purchaser, as a security for a debt, but no assignment of the term or delivery of the deeds relating to it took place; and, in 1819, an actual assignment of the term was made by the administrator of the trustee, to whom the term was assigned in 1779, to a new trustee for the purchaser in 1816:—it was held, on ejectment brought in 1819, by a prior incumbrancer, against the purchaser, that the Jury were warranted in presuming that the term had been surrendered previously to the commencement of the action; yet, in the subsequent case of *Doe d. Newman v. Putland*, Lord Chief Baron *Richards* is reported to have said, on a motion for a new trial (c), "that he did not think the doctrine of presumption a correct doctrine. That it was a very serious point, and, of late, the doctrine had been carried to a very frightful extent, and that he never desired a Jury to presume where he did not believe himself." And, in *Aspinall v. Kempson*, on *Doe v. Hilder* being cited, Lord *Eldon* said (d), "that he had paid considerable attention to it, and had no hesitation in declaring that he would not have directed a Jury to presume a surrender of the term in the

(a) 2 Barn. & Ald. 723.

chaser, 423.

(b) Ibid. 782.

(d) Ibid. 427.

(c) Sugden's Vendor and Pur-

case; and that, for the safety of the titles to the landed estates in this country, he thought it right to declare that he did not concur in the doctrine laid down in that case." Besides, it appeared, that, on the trial of the first ejectment in that case, the presumption was made against the real facts and merits as they ultimately appeared; the party having afterwards satisfactorily shewn, that there had been no surrender (a). In all the other cases on this subject, the presumption has been in favour of the owner of the inheritance, unless where he has acted against good faith, or has attempted to defeat his own acts, as in *Bartlett v. Downes*; where Lord Chief Justice *Abbott*, in delivering the judgment of the Court, said (b)—" If the outstanding term which the defendant set up could prevail, it would prevail to defeat the act of the party in making the grant she made. The general principle upon which a presumption should be allowed, is, that that which has been done, should be presumed to be rightly done." The case of *Doe d. Graham v. Scott* (c), is a strong authority against the doctrine of presumption, as against the owner of the inheritance, where the Court would not presume the surrender of a mortgage term; from the circumstance of a sum having been appropriated by the marriage settlement of a former owner to discharge it, against the express recognition by a subsequent owner of its existence, and a conveyance by him as a security. Although, in *Emery v. Grocock* (d), where a term was created in 1711; for raising portions, and there was no evidence of their being satisfied, or of the surrender of the term, yet, as the parties claiming the portions had attained their age of twenty-one; sixty years previously, and were all dead, and the estate, in 1744, had been the subject of a settlement, containing a covenant that it was free from incumbrances, and there was no evidence of the term being in existence, or

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(a) See Sugden's Vendor and Purchaser, 423, n.

(c) 11 East, 478.

(b) 3 Barn. & Cress. 621.

(d) 6 Maddock, 54.

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the portions due—the Vice Chancellor decided, that a surrender of the term must be presumed; yet the ground was, that, as there had been a clear possession for sixty years, without reference to the term, no person could claim any estate or interest under it. So, in *Townsend v. Champenown* (a), where a deed, in 1758, contained a recital of the creation of a mortgage term, and a subsequent assignment of it, in trust to attend the inheritance, and the term was not subsequently noticed in the title, Lord Chief Baron *Alexander* presumed it to have been surrendered; yet his presumption was founded on the fact, that seventy years had expired without payment of interest. There, too, the presumption was in favour of the owner of the inheritance; but, in this case, every presumption must be made against the defendant as a wrongful possessor and claiming adversely to the representative of the mortgagee, and the trustees of Mrs. *Middleditch*, the owner of the inheritance, who concur with the former in prosecuting the present suit. If, however, the Court may be inclined to presume that the mortgage to *Hammond* has been satisfied, or the term surrendered, yet, they must also presume, that all the other debts and incumbrances on the estate have been paid and satisfied, and all the trusts executed; in which case, the estate would be in the three trustees under the will of Mrs. *Middleditch*, and in whose names one of the demises was laid. It must be assumed that the executors of Mr. *Middleditch* had conveyed to the party beneficially entitled; for, in *Doe d. Bowerman v. Sybourn*, Lord *Kenyon* said (b)—“In all cases where trustees ought to convey to the beneficial owner, he would leave it to the Jury to presume, where such a presumption might reasonably be made, that they had conveyed accordingly, in order to prevent a just title from being defeated by a matter of form.” So, in *Goodtitle d. Jones v. Jones* his Lordship said (c),—

(a) 1 Young & Jer. 543.

(b) 7 Term Rep. 3.

(c) Ibid. 45.

"That though, under certain circumstances, a Judge might direct a Jury to presume an outstanding satisfied term to have been surrendered by the trustee, yet, if no such presumption were made, but it was stated as a fact that the term still continued, such a legal estate in the trustee must prevail in a Court of law." The same principle was established in *Roe d. Reade v. Reade* (a); from which it follows, that, where trustees ought to convey to the beneficial owner, it should be left to a Jury to presume, where such a presumption may be reasonably made, that they have conveyed accordingly.

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Mr. Serjeant *Merewether, contra.*—It is a general and well established principle, that Courts of law will presume the surrender of a satisfied term, if the beneficial occupation of the estate by the possessor may have induced a supposition that a conveyance of the legal estate has been made to the party beneficially interested; and the particular circumstances stated in this case are sufficient to justify the presumption, that the mortgage term assigned to *Hammond* has been either satisfied, or surrendered to the owners of the inheritance; and the late cases of *Doe v. Wright* and *Doe v. Hilder*, are decisive to shew, that terms for years, though assigned to trustees for the express purpose of attending the inheritance, may be presumed to have been surrendered; and in the latter case, Lord Chief Justice *Abbott* said (b)—"Where acts are done or omitted by the owner of the inheritance, and persons dealing with him as to the land, which ought not reasonably to be done or omitted, if the term existed in the hands of a trustee, and if there do not appear to be any thing that should prevent a surrender from having been made; in such cases, the things done or omitted may most reasonably be accounted for, by supposing a surrender of

(a) 8 Term Rep. 122.

(b) 2 Barn. & Ald. 791.

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the term; and therefore a surrender may be presumed." No title is shewn in either of the lessors of the plaintiff on the record. They all claim under trustees to whom *Mr. Middleditch* conveyed his estate in 1793, upon trust to raise money by sale or mortgage; and it must be assumed that all parties concurred in the sale decreed by the Court of *Chancery*, and to which the mortgagee was himself a party. The claim of all the lessors of the plaintiffs must be subject to that sale; therefore, the three trustees named in the will of *Mrs. Middleditch* are estopped from taking as such, under that instrument. *Clarke*, the surviving trustee, assigned all his interest to *Hammond*, the mortgagee, by the deed of *March*, 1794; and by his being a party to the suit in equity, the property was dealt with as if it were vested in the trustees under the will of *Mr. Middleditch*; and as the Court decreed, that what should be found to be due on *Hammond's* mortgage should be paid to him, it must be presumed that he was satisfied, and that the term assigned to him had ceased, by virtue of the proviso of *cesser* in the deed of release of 1793. But, if the term has not ceased, it must be presumed, that it has been surrendered, and that the mortgage money has been paid according to the directions of the Court of *Chancery*; and, as the defendant purchased certain lots under the decree of that Court, and in which the premises in question were included, he must be considered as the real owner, and having a legal title by virtue of such sale.

Mr. Serjeant *Wilde*, in reply.—Although the defendant might have purchased some of the property decreed to be sold by the Court of *Chancery* in 1802, yet he has not shewn that he has even a colour of title to the premises sought to be recovered by this action; and as the title deeds were in the custody of the representative of *Hammond*, the mortgagee, it must be assumed that his mortgage has not been satisfied, but that the term assigned

to him by the deed of 1794 is still outstanding. At all events, the defendant should have shewn the termination of the proceedings in the *Chancery* suit, which he might have done without much trouble or expense; and, as he does not claim under the owner of the inheritance, but adversely to his rights, as well as to the rights of all the parties beneficially interested, if the trustees under Mr. *Middleditch's* will ought to have conveyed to the owner of the inheritance, it must be presumed that they have done so, in order, as Lord *Kenyon* has emphatically said, to prevent a just title from being defeated by a mere matter of form.

Cur. adv. vult.

Lord Chief Justice TINDAL, after stating the facts of the special case, and that one of the demises was laid in the names of *Petty, Mules, and Woodley*, the trustees named in the will of Mrs. *Middleditch*, afterwards Mrs. *McKenzie*; and that one other demise was laid in the name of *Elton Hammond*, who was the personal representative of *Charles Hammond*, the mortgagee, delivered the judgment of the Court as follows:—

It is obvious, that the objection taken by the defendant *Cooke* cannot prevail, unless it can be shewn that the term of six hundred years, assigned to *Hammond*, in 1794, had either ceased under the proviso of *cesser*, or had been surrendered to the owners of the inheritance; for, if the term is still outstanding, the plaintiff may recover on the demise by *Elton Hammond*. In order to lay the foundation for a presumption that the term had so merged, the defendant *Cooke* proved, that, in 1799, a suit was instituted in the Court of *Chancery*, for carrying the will of Mr. *Middleditch* into effect; in which suit, amongst other persons, *Charles Hammond*, the mortgagee, was a party; and that, by certain decretal orders made in 1801 and

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1802, it was ordered, amongst other things, that monies should be raised by sale or mortgage of the estate; and that, what was found due on the mortgage, should be paid to the mortgagee; and all further directions and costs were reserved until after the sale of the estate. No other evidence was given as to any further proceedings in the *Chancery* suit; nor was any evidence adduced by the defendant *Cooke*, of any title to the premises sought to be recovered;—although it was proved that some sales took place under the decree of 1802, and that he, *Cooke*, had bought certain lots, not appearing, however, to form any part of the premises in question. In this state of things, the Court is called upon to say, that the Jury ought to have presumed that the mortgage money was paid off, and that the term had either ceased under the proviso, or had been surrendered to the owner of the inheritance, so as to be now merged in the legal estate vested in *Mangles* and *Taddy*, the trustees under the will of Mr. *Middleditch*. The question then is, whether such presumption ought to be made. We are all of opinion, that, under the circumstances stated in this case, it ought not. No case has, or indeed can be put, in which any presumption has been made, except where a title has been shewn by the party who calls for the presumption, good in substance, but wanting some collateral matter which is necessary to make it complete in point of form. In such case, where the possession is shewn to have been consistent with the existence of the fact directed to be presumed, and in such case only, has it ever been allowed. Thus, in *Lade v. Halford* (a), Lord *Mansfield* declared, that he and many of the Judges had resolved never to suffer a plaintiff in ejectment to be nonsuited by a term standing out in his own trustee, or a satisfied term set up by a mortgagee.

(a) Bull. Ni. Pri. 7th Edit. by Bridgeman, 110 a.

against a mortgagee; but that they would direct the Jury to presume it surrendered. So, in *England d. Sybourn v. Slade* (a), where the lessor of the plaintiff claimed under a lease from *John Pym*, and it appeared that the estate had been devised by *John Pym's* father to trustees, in trust to convey to *John Pym*, on his coming of age, and in the mean time for his maintenance; it was held, that though *John Pym* only came of age in *September*, 1788, and the lease expired in *March*, 1791, the Jury might presume a conveyance to *John Pym* from the trustees, which it was their duty to make, and which a Court of equity would have compelled. And, where the same facts arose in the case of *Doe d. Bowerman v. Sybourn*, Lord *Kenyon* said (b)—“That in all cases where trustees ought to convey to the beneficial owner, he would leave it to the Jury to presume, where such a presumption could reasonably be made, that they had conveyed accordingly, in order to prevent a just title from being defeated by a mere matter of form.” Again, in *Doe d. Putland v. Hilder* (c), the surrender of a mortgage term was directed to be presumed in favour of a judgment creditor who had seised the land in dispute, under an *elegit* taken out upon a judgment obtained against the owner of the inheritance:—and in *Doe d. Burdett v. Wrighte* (d), the presumption was in favour of the person who was proved to be heir-at-law, against the defendant claiming, but who failed to prove himself to be the heir. In all these cases, the presumption has been made in favour of the party who has claimed and proved a right to the beneficial ownership; the possession has been consistent with the existence of the surrender required to be presumed, and has made it not unreasonable to believe that the surrender should have

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(a) 4 Term Rep. 682.

(b) 7 Term Rep. 3.

(c) 2 Barn. & Ald. 782.

(d) *Ib.* 710.

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been made in fact; and the presumption has been made accordingly, in order to prevent justice from being defeated by a mere formal objection. But here, we are called upon to declare, that the presumption ought to have been made in favour of a party who has proved no right to the possession, nor title, nor conveyance, but who stands upon the mere naked possession, without any evidence how or when he acquired it. And what is stronger against the defendant, he only lays a partial statement before the Jury of the ground of presumption, for he only proved the commencement of the proceedings in equity, without shewing their conclusion or termination. Under these circumstances, the Court think that the defendant has not placed himself in a condition to call for any presumption in his favour; inasmuch as, for any thing that appears to the contrary, the presumption which is asked for would rather tend to defeat, than to promote the ends of justice. My brother *Gaselee*, having been concerned as counsel in the cause, has taken no part in this judgment, but begs me to state his concurrence with the rest of the Court. We, therefore, think that the verdict should remain for the plaintiff.

Postea to the plaintiff.

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KEMBLE v. FARREN.

Monday,
July 6th.

THIS was an action of special *assumpsit* for the breach of an agreement. The declaration stated, that, on the 6th June, 1827, by certain articles of agreement then made and entered into by and between the plaintiff, on behalf of himself and the other proprietors of the Theatre Royal Covent Garden, on the one part; and the defendant on the other part:—in consideration of the agreements by the plaintiff on behalf of himself and the other proprietors as aforesaid in the said articles of agreement contained, the defendant agreed to act as a principal comedian at the said Theatre Royal during the four then next seasons, commencing October, 1827, and ending at the close of the season, 1831; and the defendant thereby agreed to conform in all things to the usual regulations of the theatre; and the plaintiff, on behalf of himself and the other proprietors of the said Theatre Royal, thereby agreed to pay to the defendant the sum of 3*l.* 6*s.* 8*d.* for every night on which the said theatre should be open for theatrical performance during the said next four seasons:—and further, that the defendant should be allowed to have one play and one farce, to be chosen out of the common benefit list, exhibited for his benefit at the said theatre within the course of every season during the said next four seasons, on the defendant paying into the treasury the charge of 200*l.*; and the plaintiff, in manner aforesaid, further agreed, that, in case the said theatre should be underlet or assigned, or should be subject to any other management or control than the management

amount; and which sum was thereby declared to be the liquidated and ascertained amount of the damages, and not a penalty or penal sum, or in the nature thereof:—*Held*, that the sum of 1000*l.* could not be considered as liquidated damages, as the clause was not limited to breaches of the agreement where the damages would be of uncertain amount, but extended to the breach of any stipulation by either party.

By articles of agreement between the plaintiff and defendant, the latter agreed to act as a comedian at Covent Garden Theatre for four seasons, and to conform to the usual regulations of the theatre; and the plaintiff, as proprietor, agreed to pay the defendant 3*l.* 6*s.* 8*d.* for every night on which the theatre should be open for performance during the four seasons. And the agreement contained a clause "that if either of the parties should in anywise omit, neglect, or refuse, to fulfil, perform, or keep the agreement, or any part thereof, or any stipulation therein contained, such party should pay to the other 1000*l.*, to which sum it was agreed that the damages sustained by any such omission, neglect, or refusal, would

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and control under which it was conducted at the date of the said articles of agreement, then, and in such case, the defendant should be entitled to annul the agreement, on leaving a notice to that effect at the treasury of the theatre, addressed to the plaintiff. " And it was thereby agreed between the parties aforesaid, that if either of them should in anywise omit, neglect, or refuse to fulfil, perform, or keep the said agreement, or any part thereof, or any stipulation therein contained, such parties should and would pay to the other the sum of 1000*l.*, to which sum, it was thereby agreed, that the damages sustained by any such omission, neglect, or refusal, would amount; and which sum was thereby declared by the said parties to be the liquidated and ascertained amount of the said damages, and not a penalty or penal sum, or in the nature thereof;" as by the said articles of agreement, reference being had thereto, will appear. The plaintiff then, after averring mutual promises, alleged, that although the second of the said four several seasons in the said articles of agreement mentioned, and during which the defendant so agreed to act as a principal comedian at the said theatre, had long since commenced, to wit, on the 1st October, 1828; and, although the defendant on divers evenings and times of performance at the said theatre during the said season which had so commenced as last aforesaid, that is to say, on &c., and on divers other days and times between that day and the commencement of this suit, was duly requested by the plaintiff to act as a principal comedian at the said theatre, according to his said agreement in that behalf; and although the plaintiff hath always, from the time of the making of the said articles of agreement, and during so much as had elapsed of the said second of the said four several seasons therein mentioned, been ready and willing to pay to the defendant the sum of 3*l.* 6*s.* 8*d.* for every night on which the said theatre had been open for theatrical performances, and to al-

low him to have such play and farce as in the said articles of agreement mentioned, exhibited for his benefit at the said theatre within the course of every of the four several seasons during which he so agreed to act at the said theatre as aforesaid, on such terms as in the said articles of agreement mentioned (of all which said several premises the defendant, when he was so requested to act at the said theatre, had notice):— Yet the defendant, not regarding the said articles of agreement, or his said promise and undertaking by him so made as aforesaid, but contriving and intending to defraud and injure the plaintiff in this behalf, did not nor would, when he was so requested as aforesaid, or at any of those times, act at the said theatre, but, on the contrary thereof, the defendant, during so much as had elapsed of the said second of the said four several seasons in the said articles mentioned, and during which he so agreed to act as aforesaid at the said theatre, had wrongfully refused, and still doth refuse, to act thereat as such comedian as aforesaid, or in any way to fulfil his said agreement in that behalf; nor hath the defendant paid to the plaintiff the said sum of 1000*l*. in the said articles mentioned, or any part thereof (although often requested to pay the same), but so to do, he the defendant hath hitherto continually refused, and still doth refuse; by means of which said several premises, the plaintiff hath been greatly inconvenienced and prejudiced in the conducting and carrying on the business of the said theatre, during so much as had elapsed of and in the said last-mentioned season, in the due and profitable performance of divers comedies and popular entertainments at the said theatre during the time aforesaid, and had thereby lost divers large profits and gains, which would have arisen and accrued to him from the defendant's acting therein as such comedian as aforesaid, according to his said agreement.

At the trial, before Lord Chief Justice *Tindal*, at *Westminster*, at the adjourned sittings after the last Term, it

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was proved, that the defendant had quitted *Covent Garden Theatre* at the end of the first season, and engaged to perform and had performed at *Drury Lane*. The plaintiff sought to recover the sum of 1000*l.*, as liquidated damages, under the above clause in the agreement; but the Lord Chief Justice left it to the Jury to say what actual damage the plaintiff had sustained; and they found a verdict for him for 750*l.*, leave being reserved to the plaintiff to increase the damages to 1000*l.* if the Court should be of opinion that, upon the construction of the agreement, the plaintiff was entitled to the full sum claimed, as liquidated and ascertained damages.

Mr. Serjeant *Wilde*, on a former day in this Term, obtained a rule *nisi* accordingly, and submitted, that, by the express terms of the agreement, as well as the evident intention of the parties at the time the contract was made, the plaintiff was entitled to recover 1000*l.* for liquidated damages in respect of the breach complained of, and which formed the subject-matter of the action. Although difficulties have frequently arisen in drawing a distinction between a penalty and liquidated damages, yet, where there is a covenant in a deed, or a stipulation in an agreement to pay a certain liquidated sum, neither a Court of equity nor a Court of common law can make a new covenant or agreement, or afford any compensation or relief to a party who has been guilty of a breach of such covenant or agreement; and where a precise sum has been fixed and agreed upon by the parties, as in this case, such sum is the ascertained and liquidated damage, and to which the finding of the Jury must be confined. Although, in the late case of *Randal v. Everest* (a), where an agreement for the lease of a public house contained a clause, "that if either of the parties should neglect to comply with his part of the agreement, the party so neglecting should pay to the other

(a) 1 Mood. & Malk. 41.

100*l.*, mutually agreed upon to be the damages ascertained and fixed on breach thereof," it was held, that the party making default was not liable beyond the damages actually sustained; yet, there, the 100*l.* had been actually deposited by the plaintiff, and the action was brought to recover it back. Besides, the defendant had no right whatever to detain it, as he afterwards re-let the house. And although Lord Chief Justice *Abbott* there said, "that he should always hold, that, whether the term penalty or liquidated damages be used in an agreement, a party who claims compensation for a default shall only be allowed to recover what damage he has really sustained;" yet that does not affect previous decisions. And in *Crisdee v. Bolton* (*a*), where, in an agreement for the sale of a public-house, it was stipulated, that the seller should not be concerned in carrying on the business of a publican, within a mile from the house he had parted with, "under the penal sum of 500*l.*, the same to be recoverable as and for liquidated damages;" but he opened a public-house about three quarters of a mile distant, and no evidence of actual damage was given by the purchaser—Lord Chief Justice *Best* held, that the whole sum was recoverable as stipulated damages; but left it to the Jury to state what was the actual damage, as was done in this case; and the Jury having found for the whole sum, this Court refused to grant a new trial, which was moved for on the ground that the sum of 500*l.* was not to be considered as liquidated damages. And in *Reilly v. Jones* (*b*), where the plaintiff and defendant entered into articles of agreement, by which the former, in consideration of 2,300*l.*, agreed to sell to the latter the lease of a public-house, as he then held the same, for the expiration of his term therein, and also his goods and fixtures at a valuation; and the defendant agreed to take an assignment of the lease, and pay the above sum for it, as also the amount of the goods and fixtures, and

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(*a*) 3 Car. & Payne, 240.

(*b*) 8 B. Moore, 244; S. C. 1 Bing. 302.

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take possession of the premises on a given day; when the plaintiff agreed to give up possession of the premises and goods, to assign licences, to repair or allow for all damaged outside windows, and to clear the rent and taxes to the day of quitting possession; and the expenses of the agreement were to be paid by the parties in equal moieties; and it was lastly agreed, "that, on either party's not fulfilling all and every part of the agreement, he should pay to the other 500*l.*, thereby settled and fixed as liquidated damages:" it was held, that this sum was not a mere penalty to cover such damages as might be actually incurred by the non-performance of the agreement, but that, on a breach by the defendant for refusing to accept an assignment of the lease, or take possession, he was liable to pay the plaintiff the full amount of that sum. And Mr. Serjeant *Williams*, in a note to *Gainsford v. Griffith* (a), says—"It seems clear, that, both at law and in equity, the obligee cannot recover more damages against the obligor for the breach of a condition of a bond, than the amount of the penalty and costs; for the bond ascertains the extent of the damage by consent of the parties." So, here, the sum of 1,000*l.* was declared to be the *ascertained* and liquidated amount of the damages, by the express terms of the agreement, as well as the intention of the parties.

Mr. Serjeant *Spankie* afterwards shewed cause.—In actions for the breach of covenants and agreements, where clauses are framed in terms similar to the present, there has frequently been a great difficulty in drawing a distinction between *penalties* and *liquidated damages*, and the subject has been fully discussed in many late cases. The leading authority on the question more immediately before the Court, is the case of *Astley v. Weldon* (b), which established a general rule, *viz.* that wherever the payment

(a) 1 Wms. Saund. 58 a.

(b) 2 Bos. & Pul. 346.

of a smaller sum is secured by a larger, the latter is to be considered a penalty. There, the plaintiff, the manager of a theatre, agreed to pay the defendant, an actress, a certain sum *per week* to perform at his theatres, and also her travelling expenses; and the defendant agreed to perform at the theatres such things as she should be required by the plaintiff, and to attend at the theatres beyond the usual hours on any emergency, and at rehearsals, or be subject to certain fines; and it was agreed by both parties, at the foot of the contract, "that either of them neglecting to perform the agreement, should pay to the other 200*l.*, to be recovered in any Court of record at *Westminster*; and, it was held, that that sum was in the nature of a penalty; although the agreement contained a stipulation for liquidated damages, in terms equally as strong as the present; and Mr. Justice *Heath* said (a)—"Where articles contain covenants for the performance of several things, and then one large sum is stated at the end to be paid upon breach of performance, that must be considered as a penalty. But, where it is agreed, that, if a party do such a particular thing, such a sum shall be paid by him, then the sum stated may be treated as liquidated damages." That doctrine has been since recognized in a Court of equity, in the case of *Street v. Rigby* (b), and must govern the present. In *Astley v. Weldon*, Mr. Justice *Chambre* said (c)—"There is one case in which the sum agreed for must always be considered as a penalty; and that is, where the payment of a smaller sum is secured by a larger. In this case, it is impossible to garble the covenants, and to hold, that, in one case, the plaintiff shall recover only for the damages sustained, and, in another, that he shall recover the penalty; the concluding clause applies equally to all the covenants." There is a manifest distinction where a clause of this nature is con-

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(a) 2 Bos. & Pul. 353.

(b) 6 Ves. 817.

(c) 2 Bos. & Pul. 354.

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fin'd to the performance of one specific thing only, or where it extends to the performance of several and independent acts contained in an agreement, and some of which are of minor importance to the parties; for, where the sum, which is to be a security for the performance of an agreement to do several acts, will, in case of breaches of the agreement, be, in some instances, too large, and, in others, too small a compensation for the injury thereby occasioned, that sum is to be considered a penalty, and the amount of the damage actually or probably incurred is a question for the Jury. In *Lowe v. Peers* (a), the defendant covenanted to pay the plaintiff a stipulated sum upon a particular event only, *viz.* if he should marry any other person than the plaintiff; and, as the precise sum was there fixed and agreed upon between the parties, as a compensation in damages for a breach of promise of marriage, that sum was considered as liquidated and ascertained damages, in case the defendant should marry another woman. That is, however, altogether different from the present case, for, although the parties might have intended that if the defendant had quitted *Covent Garden Theatre*, and joined a rival establishment, he should forfeit 1000*l.*; yet it would be unjust, if not absurd, to say, that he should forfeit that sum if he neglected to attend at a single rehearsal, although he might have been punctual in his previous attendances, even to the last week of his engagement. So, on the other hand, the parties could not have contemplated, that, if the plaintiff had omitted to pay the defendant his nightly salary of 3*l.* 6*s.* 8*d.*, for a week or month, or even for a year, he should be liable to forfeit 1000*l.* for each omission. It is quite clear, that the penalty was not meant to attach for every separate breach of the agreement, or for a partial non-performance of each of the stipulations therein contained. But, as the clause in ques-

(a) 4 Burr. 2225.

tion applies in terms to the slightest violation of the agreement, the Court cannot determine to which breach it was intended to apply; and, therefore, it was most properly left to the Jury to say, what damage the plaintiff had in fact sustained. In *Astley v. Weldon*, Lord Eldon, C. J., said (a)—“What was urged in the course of the argument, has ever appeared to me to be the clearest principle, *vis.* that, where a doubt is stated, whether the sum inserted be intended as a penalty or not, if a certain damage, less than that sum, is made payable upon the face of the same instrument, in case the act intended to be prohibited be done, that sum shall be construed to be a penalty;” and his Lordship, by way of illustration of that principle, and adapting it to the case before him, said (b), —“There are many instances of the defendant’s misconduct, which are made the subject of specific fines by the laws of the theatre. Are we then to hold, that if the defendant happens to offend in a case which has been so provided for by those laws, she shall pay only 2*s.* 6*d.* or 5*s.*; but, if she offend in a case which has not been so provided for, she shall pay 200*l.*?” In *Reilly v. Jones*, the only object the parties had in view was, the sale and transfer of a public-house, and they contemplated the fulfilment of the contract *in toto*, as they agreed that either of them not fulfilling *all and every part*, should pay the other 500*l.*, thereby settled and fixed as liquidated damages; and Mr. Justice Park said (c)—“It does not appear to me, that the agreement in this case must be assumed to be for the performance of several things; and, although the fixtures and stock in trade were therein specified, and were to be valued and paid for independently of the sale of the premises, yet the substance of the agreement tended to one single act, *vis.* the relinquishment of the whole of the premises by the vendor to the vendee, who was to enter and take possession of the house.”

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(a) 2 Bos. & Pul. 350.
 VOL. III.

(b) Ib. 352.
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(c) 8 B. Moore, 252.

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In *Davies v. Penton* (a), where *A.* agreed with *B.* to sell him the stock and good-will of his business, and to demise to him the house in which the business was carried on, for which *B.* was to pay 800*l.*, and to take the furniture and fixtures at a valuation, and they were afterwards valued at 174*l.*, and 400*l.* was paid to *A.* at the time of executing the agreement, and *B.* agreed to accept and pay two bills of exchange, one for 400*l.*, payable twelve months after date, and the other for 174*l.*, payable two months after date; and *A.* agreed not to carry on the business within five miles of the house: and for the true performance of this agreement, each of them did thereby bind and oblige himself to the other of them *in the penal sum* of 500*l.*, to be recoverable for breach of the said agreement in a Court of law, as and by way of liquidated damages; it was held that this sum was a penalty, and *not* liquidated damages. And Lord Chief Justice *Abbott* said (b)—“I consider that this action is brought to recover, not a sum certain by way of liquidated damages, but so much as the plaintiff can get by way of damages; for this is a special action on the case, in which the plaintiff is entitled to recover damages in proportion to the injury stated in his declaration. We must look to the whole of the agreement in order to ascertain whether the 500*l.* was intended to be a penalty or liquidated damages; and, considering the whole agreement, we think it was clearly intended as a penalty to secure such damages as the party injured ought to receive.” So here, taking the whole of the agreement together, the plaintiff is not entitled to recover 1000*l.* for liquidated damages, but only such a compensation as the Jury might think he was entitled to receive. Mr. Justice *Bayley* said (c)—“We must look at all the parts of this instrument, in order to ascertain whether it was the intention of the parties that the sum of 500*l.* should be a penalty or

(a) 6 Barn. & Cress. 216.

(b) *Ib.* 221.

(c) *Ib.* 223.

liquidated damages. Now, where the sum which is to be a security for the performance of an agreement to do several acts, will, in case of breaches of the agreement, be in some instances too large and in others too small a compensation for the injury thereby occasioned, that sum is to be considered a penalty." Mr. Justice *Holroyd* said (a) —" We must look to the nature of the agreement, and of the sum to be paid, in order to ascertain whether the sum of 500*l.*, which was to secure the performance of the agreement, was intended to be a penalty or liquidated damages." And Mr. Justice *Littledale* said —" Since the statute of 8 & 9 *Wm.* 3, parties, in framing agreements, have frequently changed the word 'penalty' for 'liquidated damages;' but the mere alteration of the term cannot alter the nature of the thing; and if the Court see, upon the whole agreement, that the parties intended the sum to be a penalty, they ought not to allow one party to deprive the other of the benefit to be derived from the statute." So, in *Randal v. Everest*, although the words in the clause of the agreement were extremely strong, to shew that the parties intended that the damages should be ascertained and fixed on a breach of the agreement; yet Lord Chief Justice *Abbott*, in summing up to the Jury, said (b) —" A great deal has been said about the different import of the terms penalty and liquidated damages; but I am of opinion, and shall always hold so until compelled by a higher authority to say otherwise, that whether the term *penalty* or *liquidated damages* be used in the agreement, a party who claims compensation for a default, shall only be allowed to recover what damage he has really sustained." Here, as in that case, the agreement was not under seal, and as the plaintiff has declared for a breach of the agreement, he is only entitled to recover damages in proportion to the injury alleged in the declaration, *viz.* for the defendant's

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(a) 6 Barn. & Cress. 224.

(b) 1 Mood. & Malk. 42.

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refusal to perform during the second season. The plaintiff had the benefit of the defendant's services during the first year in which he had performed; and the Jury have proportioned the damages accordingly. *Pothier* says (a)—“I cannot receive the whole of the penalty, and enjoy in part the benefit of my right of servitude; I cannot, at the same time, have the one and the other.” Although in *Crisdee v. Bolton*, Lord Chief Justice *Best* said, that he could not subscribe to the doctrine attributed to Lord *Tenterden* in *Randal v. Everest*; yet, as the Chief Justice observed in *Crisdee v. Bolton*, the sum of 500*l.* was to be paid for the doing of one thing only, *viz.* the setting up a victualling-house within one mile of the house transferred to the plaintiff. So, in *Barton v. Glover* (b), the agreement was confined to the performance of one thing only, *viz.* the defendant's withdrawing a stage-coach, of which he was the proprietor, from a particular line of road; and in *Farrant v. Olmivus* (c), the lease reserved an increased rent for every acre of certain fields converted into tillage: and Lord Chief Justice *Abbott* said, that “there certainly was nothing unreasonable in a landlord stipulating that particular lands should not be converted into tillage at all, and that in case it was done, a large sum should be paid by way of stipulated damages.” There, however, the parties had but one object in view, *viz.* the conversion of grass land into tillage. The cases of *Ponsonby v. Adams* (d), *Rolfe v. Peterson* (e), and *Roy v. The Duke of Beaufort* (f), were referred to and commented on by Lord *Eldon* in *Astley v. Weldon*; and it is, therefore, only necessary to refer to the latter case as to the doctrine established in Courts of equity by those decisions. On these grounds, there is no reason to increase the damages found by the Jury, or to disturb their verdict.

(a) *Traites des Obligations*, part 2, cap. 5, art. 3, pl. 351.
 (b) *Holt's N. P. C.* 43.
 (c) 3 *Barn. & Ald.* 692.

(d) 6 *Brown's Parl. Cas.* 417.
 (e) *Ib.* 470.
 (f) 2 *Atk.* 190.

Mr. Serjeant *Wilde*, in support of his rule.—It has been truly observed, that it is very difficult to ascertain the principle upon which the distinction between the terms ‘penalty’ and ‘liquidated damages’ has been founded in contracts of this nature; for, as Lord *Eldon* said in *Astley v. Weldon* (a)—“When this cause came before me at *Nisi Prius*, I felt, as I have often done before, in considering the various cases on this head, much embarrassed in ascertaining the principle upon which those cases were founded. A principle has been said to have been stated in several cases, the adoption of which one cannot but lament, namely, that if the sum would be very enormous and excessive, considered as liquidated damages, it shall be taken to be a penalty, though agreed to be paid in the form of a contract. This has been said to have been stated in *Rolfe v. Peterson*, where the tenant was restrained from stubbing up timber. But nothing can be more obvious than that a person may set an extraordinary value upon a particular piece of land, or wood, on account of the amusement which it may afford him. In this country, a man has a right to secure to himself a property in his amusements; and if he choose to stipulate for 5*l.* or 50*l.* additional rent upon every acre of furze broken up, or for any given sum of money upon every load of wood cut and stubbed up, I see nothing irrational in such a contract; and it appears to me extremely difficult to apply, with propriety, the word ‘excessive’ to the terms in which parties choose to contract with each other.” And Mr. Justice *Rooke* said (b)—“The determination of the Court in construing this instrument must be guided by the intention of the parties.” And Mr. Justice *Chambre* put the question upon the fair presumable intention of the parties:—such intent must be collected from the whole of the instrument, and the Court is not to judge whether the terms or stipulations therein

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(a) 2 Bos. & Pul. 350.

(b) Ibid. 353.

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contained be reasonable or not. They must be guided entirely by the apparent intention of the parties at the time the contract or agreement was entered into. If a party stipulate not to set up in trade against another within a given time, or a certain distance, under a specified penal sum, he is liable to pay the full amount, although he commit a breach of the agreement by setting up in trade on the last day, or within a few yards of the place limited. Although it may be said, that the amount of damages to which a party may be entitled, must vary according to circumstances, yet the intention of the parties cannot be controlled or departed from, where they have expressly fixed a certain sum to be due as *liquidated and ascertained damages*, and not as a penalty, as in this case. In *Reilly v. Jones*, Mr. Justice Park said (a)—“No case has been pointed out or adverted to, where, after the parties themselves have used and adopted the words ‘*liquidated damages*,’ that it has been holden that the plaintiff should not recover the sum actually named and fixed as such damages in an action founded on the breach of the agreement. But it appears to me to be unnecessary to say that there is no such case; as on looking at the terms of the agreement itself, on which alone I found my opinion, I think there can be no doubt as to the *intention* of the parties.” The case of *Davies v. Penton* turned on peculiar circumstances, as the defendant, after pleading that the plaintiff did not pay the bills of exchange according to the agreement, whereby the sum therein mentioned became forfeited, pleaded a set off, by which he waived his right to insist on liquidated damages. But the reasoning of Lord Chief Justice Best, in the late case of *Christie v. Bolton*, is precisely in point. His Lordship said (b)—“I think that the parties to contracts, from knowing exactly their own situations and objects, can better ap-

(a) 8 B. Moore, 252.

(b) 3 Car. & Payne, 242.

preciate the consequences of their failing to obtain those objects than either Judges or Juries. Whether a contract be under seal or not, if it clearly states what shall be paid by the party who breaks it to the party to whose prejudice it is broken, the verdict in an action for the breach of it should be for the stipulated sum. Our office is to ascertain the intent of the parties, and, if not contrary to law, to carry their intent into execution." Here the object of the plaintiff was to secure the performance of the defendant as an actor at *Covent Garden Theatre* for four successive seasons, and that during that period he should not withdraw or transfer his services to a rival establishment. But he did so at the commencement of the second season, and has not performed at *Covent Garden* since. It was, therefore, an entire withdrawal for the whole of the remainder of the term contracted for; and although the sum of 1000*l.* may appear to be exorbitant for a slight or trifling violation of the contract, yet it was so fixed by both parties. On taking the whole of the terms of the agreement into consideration, the liquidated damages must be taken to apply to those breaches only which were in their nature uncertain; and if the defendant had refused to perform at the theatre on any night within the period contracted for, he would have been liable to the payment of the stipulated sum, which was expressly declared to be liquidated and ascertained damages, and not a penalty, or in the nature thereof. It is impossible to use stronger language; and the clause was framed for the purpose of removing any doubt that might possibly arise as to its construction, and by which the parties must be bound; and as the defendant has been guilty of a substantive breach of the agreement by withdrawing himself from the theatre, the plaintiff is entitled to have the verdict found for him increased to the sum prayed.

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Cur. adv. vult.

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Lord Chief Justice TINDAL now delivered the judgment of the Court as follows:—

This is a rule which calls upon the defendant to shew cause why the verdict which has been entered for the plaintiff for 750*l.* should not be increased to 1000*l.* The action was brought upon an agreement made between the plaintiff and the defendant, whereby the defendant agreed to act as a principal comedian at the Theatre Royal, *Covent Garden*, during the four then next seasons, commencing in *October*, 1828, and also to conform in all things to the usual regulations of the said Theatre Royal, *Covent Garden*; and the plaintiff agreed to pay the defendant 3*l.* 6*s.* 8*d.* every night on which the theatre should be open for theatrical performances during the next four seasons, and that the defendant should be allowed one benefit night during each season, on certain terms therein specified. And the agreement contained a clause, “that if either of the parties should neglect or refuse to fulfil the said agreement, or any part thereof, or any stipulation therein contained, each party should pay to the other the sum of 1000*l.*; to which sum it was thereby agreed that the damages sustained by any such omission, neglect, or refusal should amount, and which sum was thereby declared by the said parties to be liquidated and ascertained damages, and not a penalty or penal sum, or in the nature thereof.” The breach alleged in the declaration was, that the defendant refused to act during the second season; for which breach the Jury, upon the trial, assessed the damages at 750*l.*; which damages, the plaintiff contends, ought, by the terms of the agreement to have been assessed at 1000*l.* It is certainly difficult to suppose any words more precise or explicit than those used in the agreement, the same declaring not only affirmatively that the sum of 1000*l.* should be taken as liquidated damages, but negatively also, that it should not be considered as a penalty, or in the nature thereof; and if the clause had been limited or confined to breaches

of the agreement where the damages would be of an uncertain nature and amount, we should have thought that it would have had the effect of ascertaining the damages upon any such breach at 1000*l.*, for we see nothing illegal or unreasonable in parties, by their mutual agreement, settling the amount of damages, uncertain in their nature, at any sum upon which they might agree. In some, indeed in many cases, such an agreement fixes that which is almost impossible to be accurately ascertained, and in all cases it saves the expense and difficulty of bringing up witnesses at the trial to ascertain that point. But in the present case the clause is not so confined, for it extends to the breach *of any stipulation by either party*. If, therefore, on the one hand, the plaintiff had neglected to make a single payment of *3*l.* 6*s.* 8*d.* per night*, or, on the other hand, the defendant had refused to conform to any usual regulation of the theatre, however minute or unimportant, it must have been contended that the clause in question, in either case, would have given the stipulated damages of 1000*l.* But that a very large sum should become immediately payable in consequence of the non-payment of a very small sum, and that the former should not be considered as a penalty, appears to be a contradiction in terms, the case being precisely that in which Courts of equity have always relieved, and against which Courts of law have also, in modern times, endeavoured to relieve, by directing Juries to measure and assess the damages actually sustained by the breach of the agreement. But it has been argued at the bar, that the liquidated damages apply to those breaches of the agreement only which are in their nature uncertain, leaving those which are certain to a distinct remedy by the verdict of a Jury. But we can only say, that if such was the intention of the parties, they have not so expressed it, but have made the clause relate, by express and positive terms, to all breaches of every description, and of the most trifling na-

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ture. We, therefore, cannot distinguish this case in principle from that of *Astley v. Weldon*, in which it was stipulated, "that either of the parties neglecting to perform the agreement, should pay to the other of them 200*l.*, to be recovered in any of his Majesty's Courts of record at *Westminster*." In that case, there was a distinct agreement, that the sum stipulated should be liquidated and ascertained damages. There were clauses in the agreement, some sounding in uncertain damages, others relating to certain pecuniary payments. The action was brought for the breach of a clause of an uncertain nature; and yet it was held by the Court, that, for this very reason, it would be absurd to construe the sum inserted in the agreement as liquidated damages, and that it was a penal sum only. As that case appears to us to have been decided on a clear and intelligible principle, and to apply to the present, we think it right to adhere to it; and this makes it unnecessary to consider the subsequent cases, which do not in any way break in upon it. We think, therefore, that the present verdict should stand, and the rule for increasing the damages be

Discharged.

Tuesday,
 July 7th.

MITCHINSON and Others v. BEGBIE and Others.

The plaintiffs,
 ship owners,
 contracted by
 charter-party
 with *A.*, to take

on board a cargo of wheat, at *Dantzic*, where *A.* resided, and convey it to *London*, at 4*s.* 6*d.* per quarter. *A.*, not having a cargo ready, entered into a sub-charter-party with *B.* to take corn at 6*s.* per quarter. *B.* consigned the cargo to the defendants under bills of lading, by which the corn was made deliverable to them, or their assigns, on paying freight at 6*s.* per quarter. No reference was made to the sub-charter-party in the bills of lading. *B.* gave the defendants notice not to pay the full freight to the plaintiffs, stating that they were only entitled to freight at 4*s.* 6*d.* per quarter:—*Held*, that the plaintiffs could only recover freight at that rate, although the defendants, in ignorance of the sub-charter-party or claim of *B.*, had at first promised to pay the full freight of 6*s.*, according to the bills of lading.

THIS was an action of *assumpsit* for freight. At the trial, before Lord Chief Justice *Tindal*, at *Guildhall*, at

the Sittings after the last Term, it appeared that the plaintiffs, as owners of the ship *William Peile*, in September, 1828, entered into a charter-party with Messrs. *Sack, Bremer, & Co.*, ship brokers in *London*, as agents for *G. E. Gerlach*, at *Dantzic*, by which it was stipulated, that the ship should proceed forthwith from *London* to *Dantzic*, and there take on board a full and complete cargo of wheat for *London*, for certain freight payable in that behalf, *viz.* at the rate of 4*s.* 6*d.* *per* quarter; that, on the arrival of the ship at *Dantzic*, there was a great demand for vessels, as corn had risen in price in this country, and *Gerlach*, having no cargo ready, employed a broker to let the ship on his account. The broker accordingly entered into a negotiation with Messrs. *Saermans & Son*, at *Dantzic*; and, on the 8th October, 1828, a charter-party was entered into there, which stated that the following freight conditions had been agreed for the ship *William Peile*, commanded by Captain *Liddle*, for the voyage from *Dantzic* to *London*, who, after verbal and mutual understanding with the shippers, Messrs. *Saermans & Son*, on one side, and the loader, Mr. *G. E. Gerlach*, through the medium of the broker who signed the charter-party, agreed that the ship should receive a full and easy cargo of wheat, on freight, six shillings for each delivered imperial quarter, on the regular and due delivery at the place of destination. The captain signed bills of lading on the shipment of the corn, on the 16th October, 1828, by which 709 quarters of wheat were made deliverable to the defendants, or their assigns, they paying freight for the said corn, 6*s.* *per* quarter. No reference was made to the sub-charter-party by the bills of lading, and it did not appear whether the captain had negotiated for the sub-charterer, as agent of the plaintiffs, or of *Gerlach*, or when the instrument was executed. The vessel having arrived at *London*, and the wheat being demanded by, and delivered to the defendants, the plaintiffs

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claimed freight at the rate of 6*s.* *per* quarter, according to the bills of lading, which the defendants promised to pay, being then ignorant of the sub-charter-party or the claim of Messrs. *Saermans*, the shippers. The amount of the full freight, at the rate of 6*s.* *per* quarter, was 56*l.* The wheat remaining in the defendants' hands was attached by order of Messrs. *Saermans & Son*, who gave them notice, that the plaintiffs were only entitled to freight at the rate of 4*s.* 6*d.* *per* quarter, which the defendants paid. The attachment having been dissolved by the defendants' putting in bail, and they having refused to pay the additional 1*s.* 6*d.* *per* quarter, as claimed by the plaintiffs, the present action was commenced.

The Jury found a verdict for the plaintiffs for the full amount of the freight, leave being reserved to the defendants to move to set it aside, and that a verdict might be entered for them instead thereof, in case the Court should be of opinion that the plaintiffs were not entitled to recover the full freight, at the rate of 6*s.* *per* quarter, as claimed by them under the bills of lading.

Mr. Serjeant *Wilde*, on a former day in this Term, obtained a rule *nisi* accordingly, and submitted, that the plaintiffs could only be entitled to recover freight for the wheat, according to the stipulations contained in the charter-party, entered into between them and *Sack, Bremer & Co.*, as agents for *Gerlach, vis.* at the rate of 4*s.* 6*d.* *per* quarter. The bills of lading were not signed by the captain, as agent of the plaintiffs as owners of the ship, but as agent of *Gerlach*, on whose behalf the sub-charter-party was effected.

Mr. Serjeant *Jones* now shewed cause.—The defendants received the wheat under the bills of lading, by which it was made deliverable to them, on their paying freight, at the rate of 6*s.* *per* quarter. The plaintiffs, therefore,

were entitled to freight according to the terms of the bills of lading; and the defendants having promised to pay at the rate of 6*s.* *per* quarter, they could not afterwards set up a right or claim by Messrs. *Saermans*, under a sub-contract, as against the plaintiffs. Neither the plaintiffs nor the defendants were parties to the sub-charter-party entered into at *Dantzie*, nor did it appear that the captain acted as the agent of *Gerlach*. He might have negotiated with the broker on behalf of the plaintiffs, and although there might have been a sub-letting of the ship to Messrs. *Saermans & Son*, still the circumstances, as proved at the trial, are sufficient to entitle the plaintiffs to retain their verdict. Although the defendants insist, that the terms of the charter-party from the plaintiffs to *Gerlach* estop them from recovering more than 4*s.* 6*d.* *per* quarter, as that was all they contracted to receive for freight under that instrument; yet, as the defendants demanded and received the cargo, liable to the freight, it is evidence of a new contract to pay according to the tenor of the bills of lading, and falls within the principle established in *Cock v. Taylor (a)*, *vis.* that, although no express agreement be made by the shipper for freight, yet that the consignee becomes liable for it, by accepting the goods under the bill of lading; and Lord *Ellenborough* there said—"Though there were no original privity of contract between these parties for payment of the freight, yet the taking of the goods from the ship by the purchaser under the bill of lading, is evidence of a new agreement by him, as the ultimate appointee of the shippers for the purpose of delivery, to pay the freight due for the carriage of such goods, the delivery of which was only stipulated with the shippers to be made to the consignees named in the bill, or their assigns, he or they paying freight for the said goods." This is not a new doctrine, for in *Roberts v. Holt (b)*, it was held, that if a consignee receive goods in pursuance of a bill of lading,

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(a) 13 East, 399.

(b) 2 Show. 443.

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(d) 1 East, 507.
(c) 1 Esp. Rep. 24.
(f) 4 Rob. Adm. Rep. 236.

(a) 3 Taunt. 394.
(b) 6 East, 622, n
(c) 3 Camp. 548.

freight. In *Bell v. Kymer* (a), the indorsee of a bill of lading of goods shipped by a chartered vessel, deliverable to the consignee or his assigns, he or they paying freight according to the charter-party, was held liable to the charterer for the freight, although the goods were landed before the bill of lading was indorsed, and the indorsee had paid over the proceeds to the indorser before the freight was demanded. In *Moorsom v. Kymer* (b), there was an express contract in the charter-party which provided for the payment of freight, and there was no implied contract on the part of the indorsee of the bill of lading to pay. In *Pinder v. Wilks* (c), the defendants were neither the consignees nor holders of the bills of lading, and they had assigned all their effects to a trustee for benefit of creditors, previously to the arrival of the goods. These cases, therefore, are distinguishable from *Cock v. Taylor*, which must govern the present; and, as the defendants not only promised the plaintiffs to pay the freight to them, but actually paid part of it, they admitted their liability to pay the whole according to the terms of the bills of lading; and if Messrs. *Saermans & Son*, the consignors of the wheat, had a right to the additional freight under the sub-charter-party entered into between them and *Gerlach*, at *Dantzic*, they must make their claim on the plaintiffs, who are clearly entitled to recover the full freight as against the defendants, they having received the cargo under the bills of lading.

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Mr. Serjeant *Wilde*, and Mr. Serjeant *Stephen*, in support of the rule, were stopped by the Court.

Lord Chief Justice TINDAL.—I think that this rule ought to be made absolute. It is quite clear, from the

(a) 5 Taunt 477; S. C. 1 Marsh. 146.

(b) 2 Man. & Selw. 303.

(c) 5 Taunt. 612.

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evidence adduced at the trial, that the plaintiffs have obtained as much as they had bargained for, *viz.* the full amount of the freight stipulated to be paid to them according to the provisions of the charter-party; but they now seek to recover an extra sum for freight made payable under bills of lading, but which freight in fact belongs to Messrs. *Saermans*, the shippers, to whom *Gerlach* let the ship; and the charter-party entered into between those parties at *Dantzic* was sufficiently proved, both in substance and in terms. If, however, the defendants were liable for the extra or full freight, or could be compelled to pay it by any strict rule of law, we must be bound by it. All the cases to which we have been referred, were cases where no *jus tertii* intervened. The parties who were entitled to the additional freight gave the defendants notice not to pay it to the plaintiffs. The question then is—Whether, in defiance of such notice, they were bound to do so, the wheat being deliverable to them by the bills of lading, on paying freight at 6*s.* *per* quarter, the freight payable by the plaintiffs' charter-party being 4*s.* 6*d.* only. Although the defendants at first promised to pay the full freight of 6*s.* *per* quarter, yet they did not then know the conflicting rights of the parties who were really entitled to receive it; and, therefore, such promise is not binding on them. If an agent receive money, with directions from his principal to pay it over to a third party, the principal may revoke the authority given to the agent, at any time before the payment is actually made. Here, the plaintiffs have received the whole of the benefit they expected to derive under the charter-party entered into by them with the agents for *Gerlach*. If a landlord let a house for 30*l.* *per annum*, and the tenant underlet it for 40*l.*, the landlord cannot claim the additional rent from his lessee. So, here the plaintiffs cannot be entitled to recover the additional freight of 1*s.* 6*d.* *per* quarter, according to the sub-charter-party entered into between *Gerlach* and Messrs. *Saermans*, at *Dantzic*; and, as the defendants had notice not to

pay such freight to the plaintiffs, I am of opinion, that they were not entitled to recover it in this action.

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Mr. Justice PARK.—I am entirely of the same opinion. There was sufficient evidence to support the sub-charter-party entered into between *Gerlach*, the original charterer, and Messrs. *Saermans*, at *Dantzic*. Although the bills of lading were signed by the captain, it did not appear that the contract at *Dantzic* was made by him on behalf of the plaintiffs. There is no rule of law or equity to prevent the charterer of a ship abroad, who cannot obtain a cargo, to let her to another at a higher rate by a sub-charter-party. The plaintiffs agreed with the agents of *Gerlach* to convey the wheat from *Dantzic* to *London*, at 4*s.* 6*d.* *per* quarter, and they have received the amount from the defendants at that rate. The plaintiffs, therefore, have sustained no injury, for they never entered into a contract to be paid freight at the rate of 6*s.* *per* quarter. The cases cited by my brother *Jones* have no reference to the present, as there the rights of third parties had not intervened; and Messrs. *Saermans*, the shippers, were clearly entitled to the benefit of the contract entered into with *Gerlach* at *Dantzic*, where it was agreed by the original charter-party that the cargo was to be shipped.

Mr. Justice BURROUGH.—The question in truth is, whether the plaintiffs can be entitled to recover the full freight at 6*s.* *per* quarter, when they engaged, by the terms of their charter-party, with the agents of *Gerlach*, to bring home the wheat at 4*s.* 6*d.* *per* quarter. Messrs. *Saermans*, the shippers, are clearly entitled to receive the additional 1*s.* 6*d.* *per* quarter, according to the terms of the sub-charter-party entered into between them and *Gerlach*, and over which the plaintiffs could have no control.

Rule absolute (a).

(a) **Mr. Justice Gaselee** was at Chambers.

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Wednesday,
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HENLEY *v.* The Mayor and Burgesses of LYME REGIS.
[In Error] (a).

A burgess of a corporation may justify as bail in error, in an action brought against the corporation, if he be not a capital burgess or a party on the record.

ON Mr. Serjeant *Wilde's* opposing the justification of the bail in error, in this cause, one of them admitted that he was a burgess of the corporation of *Lyme*; on which the learned Serjeant insisted, that he was not in a situation to justify, he being a member of the corporate body, and, in effect, one of the defendants on the record.

But, on the bail's stating that he was not a *capital* burgess, nor a party to the suit, the Court held—that, as he might be examined as a witness at the trial, and that, in case the plaintiff recovered, the verdict could not affect him, there was no foundation for the objection.

The bail justified accordingly.

(a) See *ante*, page 315.

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JEFFERIES, *Ex parte*.

The Court granted a writ of privilege to exempt the deputy to the clerk of the treasury, from serving the office of overseer of the poor in the parish in which he resided, the duties of that office being incompatible with his personal attendance on the Court.

MR. Serjeant *Wilde*, on a former day in this Term, obtained a rule *nisi*, that a writ of privilege might issue, to exempt the applicant, Mr. *Jefferies*, the deputy to the clerk of the treasury of this Court, from serving the office of overseer of the poor of the parish of *St. Giles*. The learned Serjeant founded his motion on an affidavit of the applicant, which stated, that he had filled the situation of deputy to the clerk of the treasury of this Court since the year 1812, that the duties of the office required his personal attendance during Term and at the Sittings, from eleven in the morning until two in the afternoon, and from six to eight in the evening; and that he was entrusted with the custody of the records of the Court, which he filed and kept in proper order, and which he

was obliged to produce to parties applying to inspect them, and for which he was entitled to a fee or remuneration.— That he had offered to serve the office of overseer by deputy, or to pay the usual fine imposed on a parishioner of *St. Giles*, who is appointed to fill that office.

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Mr. Serjeant *Mercwether* afterwards shewed cause.— The privilege of the Court extends only to exempt its officers from *personal* duties. The question then is, whether personal attendance was requisite in both the offices which Mr. *Jefferies* was called upon to fill. In *Gerard's* case (a), it was held, that an attorney is not privileged from serving in the militia, or providing a substitute; and although Mr. Justice *Blackstone* there said, that privilege extends to all cases of personal service, as in the case of overseers of the poor, and he referred to the *Officina Brevium* (b) as an authority; yet he observed, that there was no pretence for privilege, if it were not a personal service. Although, in the case of *The King v. Clarke*, Mr. Justice *Grose* said (c)—“ That the office of constable might be served by deputy; ”—yet the office of overseer of the poor cannot. But the office of deputy to the clerk of the treasury might, as the duties of the office did not require *his personal* attendance; and even if they did, he might procure a deputy. Although, in the case of *The King v. Warner* (d), it was decided, that an officer of the customs was exempted from serving the office of overseer of the poor, although he had not his writ of privilege at the time; yet there the offices were incompatible, and, having obtained his writ of privilege, the Court at once admitted that it exempted him from serving the office. Besides, the office of clerk of the treasury is not a patent office. He holds his place by the parol appointment of the Lord

(a) 2 Sir W. Bl. 1123.

(c) 1 Term Rep. 689.

(b) Page 462.

(d) 8 Term Rep. 375.

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Chief Justice; and, although it is his duty to take care of and file all the records of the Court, yet his personal attendance is not necessary for that purpose, and the applicant should have at least shewn the Court that his office could not have been performed by deputy. A writ of privilege has never been extended to an officer of the Court, who fills the place of deputy. An attorney stands in a different situation, as he is entitled to his privilege, not only as an immediate officer of the Court, but it is his duty to attend personally, and watch the progress of a cause, in which his client not only requires his professional skill and assistance, but his presence in Court is necessary. In *March's Reports* (a), a clerk of the Court residing in London was chosen churchwarden, and prayed a writ of privilege, which was granted; and the whole Court agreed, that, for all offices which require personal and continual attendance, as churchwarden, constable, and the like, he may have his privilege; but for offices which may be executed by deputy, and do not require attendance, as recorder and the like, for these he shall not have his privilege. Here, therefore, the applicant should have shewn, either that the offices of clerk of the treasury and overseer of the poor were incompatible, or that the duties of the former office could not be performed by a deputy. In *Bishop v. Lloyd* (b), a writ of privilege was refused to the chief accountant to the commissioners for victualling the navy, who was chosen churchwarden, as there was no absolute incompatibility in the two offices. Besides, the duty of an overseer is paramount to that of a deputy or inferior officer of the Court, the former being created by statute, and on whom an imperative duty is cast. The writ, therefore, ought not to go.

Mr. Serjeant *Wilde*, in support of the application.—The

(a) Page 30.

(b) Bunbury, 255.

office of deputy to the clerk of the treasury of this Court is an office of considerable importance. He has not only the care and custody of the treasury of the Court, which contains all the records, but he examines and signs all copies taken from the rolls, and all records of *Nisi Prius*. He also amends records, and exemplifies verdicts and judgments. It is therefore an office which requires great care and attention, and there are fixed and stated hours of attendance; and the Court must assume that *personal* attendance is necessary; and if so, they will take judicial notice of the duties of their officer, and afford him the protection he seeks. It has been admitted, that an attorney is privileged, although he is not actually bound to attend the Court; whilst here it is sworn that the personal attendance of the officer is necessary. In *The Mayor of Norwich v. Berry* (a), an attorney of this Court was held to be privileged from serving a corporate office, although he resided within the corporation town, before, and at the time he was admitted an attorney; and Lord Mansfield said—"The privilege insisted upon as the ground of exemption is the privilege of the Court," and where an officer of the Court has a duty to perform which is created by the Court, he is entitled to its protection. Although an overseer of the poor could not, formerly, appoint a deputy, yet, by the statute 59 Geo. 3, c. 12, s. 7, assistant overseers may be appointed, who are empowered to execute all the duties to be performed by overseers, previously to the passing of that act.

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Cur. adv. vult.

Lord Chief Justice TINDAL on this day delivered the judgment of the Court, as follows:—

In this case, an application was made by an officer of this Court, for a writ of privilege to issue, to exempt him

(a) 4 Burr. 2109; S. C. 1 Sir W. Bl. 636.

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from serving the office of overseer of the poor of the parish of *St. Giles*. Having looked into all the authorities on the subject, as well as the nature of the office, and the duties of the clerk of the treasury of this Court and his deputy, we are of opinion that the writ ought to go. The duties of each are clearly expressed and pointed out in the report of the commissioners appointed by Parliament for examining into the duties, salaries, and emoluments of the officers, clerks, and ministers of the several Courts of justice in *England and Wales*. It is there stated (*a*), that the clerk of the treasury is verbally appointed by the Lord Chief Justice for the time being, and is accountable to him for the profits of the office, with the few exceptions afterwards stated. The duties of the clerk of the treasury are performed in part at the chambers of the Lord Chief Justice, and in part at the treasury of the Court. Those duties which are performed at the chambers, this officer performs in person. Those duties which are performed at the treasury, are performed on his behalf by the deputy to the treasury keeper. We consider it to be the duty of the clerk of the treasury, to take care of the records in the treasury, and to sign all copies and exemplifications taken from the rolls, to keep a file of all rules and orders relating to the rules in the treasury, and to give attendance, by himself or his deputy, in the treasury, every day in Term time. The deputy of the treasury keeper, on behalf of the clerk of the treasury, signs all copies and exemplifications from the records. Rules and orders of the Court, relating to the records, are filed by such deputy; attendance is given in the treasury by such deputy every day in Term, during the sitting of the Court, and at other times when especially desired. The present clerk of the treasury was appointed in 1811, on the decease of his father, who held the office from about the year 1781, until that

(*a*) Page 87.

time. We believe, that, generally speaking, the practice of the office is the same at the present time, as it was in the time of the father of the present officer. As to the circumstance of discharging the duties in the treasury by a deputy, and the personal non-attendance of the officer at any other place than the chambers of the Chief Justice, we believe the practice to be altogether the same. The present deputy to the clerk of the treasury, acting as above mentioned in respect of the duties in the treasury, was appointed in the year 1812. The duties performed by this officer *in person*, are as follow:—to pass all records of *Nisi Prius* for *London* or *Middlesex*, or for the assizes, and to enter in a book kept for the purpose, the names of the plaintiff and defendant, the name of the plaintiff's attorney, &c. For the purposes above mentioned attendance is given at the chambers of the Lord Chief Justice, during the Term, and during the Sittings at *Nisi Prius* for *London* and *Middlesex*; and also, during the Sittings after the Summer Assizes are over, attendance is given for a few days before *Michaelmas* Term, and, after the *Christmas* vacation, for a few days before *Hilary* Term. The hours of attendance are from eleven in the morning until two in the afternoon, and from five till eight in the evening.

It therefore appears, that the deputy to the clerk of the treasury is bound to attend personally in the discharge of his duties, each day successively, for a certain portion of the year. The ground on which an attorney is entitled to his privilege is laid down by Lord *Mansfield* and Mr. Justice *Yates*, in *The Mayor of Norwich v. Berry*, viz. that the privilege is the privilege of the Court; that it must have ministers, and that an attorney is exempt from all offices incompatible with his attendance in the Court in which he practises. That he is bound to attend the Court; and, therefore, that he is not within the terms of a bye-law, which made his attendance requisite in another place, for that he could not be necessarily attendant in both places

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at the same time. So, here, the deputy to the clerk of the treasury is bound to attend personally, in discharge of the duties imposed on him by the Court, and which are for the benefit of the public at large. The *Officina Brevium* is a book of great authority, and contains several precedents of writs of privilege for different officers of the Court. The first is to exempt a clerk of the Prothonotary from serving the office of constable (a). There is another to exempt the clerk of the Chirographer from executing the office of overseer of the poor (b); another to exempt the Clerk of the Exigents from the collectorship of tithes (c); and another, directed to the mayor and aldermen of *London*, to exempt the Treasurer of the Court of *King's Bench* from being chosen a constable; and the writ states (d), that he was the treasurer of the Bench, where the records are kept; and that his continual residence in Court was required, for the public advantage and utility (e). And, although it may be said, that the office of overseer of the poor may be executed by deputy, we are strongly inclined to think that it cannot. But, it is unnecessary to determine that point, as the clerk of the treasury and his deputy are exempt from serving the office on the grounds I have stated. In the case of *The King v. Warner* (f), an officer of the customs was held to be exempted from serving the office of overseer, although he had not his writ of privilege at the time he was appointed; and Mr. Justice *Grose* thought that the two offices were incompatible. In *Stone's* case (g), a writ of privilege was granted to an attorney to exempt him from being reeve to the lord of a manor, he being a copyholder, and liable to serve by cus-

(a) Page 160.

(b) Ibid. 162.

(c) Ibid. 163.

(d) Ibid. 163.

(e) The words in the writ are as follow:—viz. "*A. W. curiam habentem Domus Thesaurarii nostri de Banco prædicto, ubi recorda nos-*

tra in eodem Banco conservantur, cujus continua residentia in curia nostrâ, pro nostro et ligcorum nostrorum commodo et utilitate, requiritur."

(f) 8 Term Rep. 375.

(g) 1 Lev. 265.

tom; and, although it was said, that he might execute the office by deputy, yet the Court held, that the privilege of the Court was as ancient as the custom of any manor, and that he was responsible for his deputy. Looking, therefore, at the nature of the office of the deputy to the clerk of the treasury, and the duties required of him, as well as the authorities to which I have referred, we are of opinion, that the writ of privilege ought to go. This rule, therefore, must be made

Absolute.

WALSH, Bart. and Another, Executors of Sir HENRY
STRACHEY, Bart. v. FUSSELL.

Wednesday,
July 8th.

THIS was an action of covenant by the executors of Sir *Henry Strachey*, deceased. The declaration stated, that heretofore, and in the lifetime of Sir *Henry Strachey*, to wit, on the 12th *March*, 1792, at the parish of *Elm*, in the county of *Somerset*, by a certain indenture then and there made between the said Sir *Henry* of the one part, and the defendant of the other part; the said Sir *Henry*, for the considerations therein mentioned, did demise, lease, and to farm let, unto the defendant, his executors, administrators, and assigns, all that remaining part of a messuage or dwelling-house, with the mill, stable, and garden thereto adjoining and belonging, called *Curtis's Mill*, situate and being within the parish of *Elm* in the said county of *Somerset*, and of which the said Sir *Henry* was seised in his demesne as of fee, together with all out-houses, ways, waters, &c. and appurtenances whatsoever, to the said remaining part of the said messuage or dwelling-house, mill, and premises belonging or in anywise appertaining: To have and to hold the same to the defendant for a certain term as in the said indenture mentioned, which said term is yet unexpired.

In an indenture of lease, the lessee covenanted with the lessor, his heirs and assigns, to indemnify the overseers for the time being of the parish in which the premises demised were situate, from all costs and charges by reason of the lessee's taking an apprentice or servant who should thereby gain a settlement within, or become chargeable to the parish:—*Held*, to be a valid covenant, although it was objected that it was unreasonable, in restraint of trade, and contrary to the policy of the poor laws:—*Held*, also,

that the action was well brought by the executors of the lessor, as the covenant was an express covenant with him personally, and did not run with the land.

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And the defendant, for himself, his executors, administrators, and assigns, did, in and by the said indenture, in another part thereof, covenant, promise, and grant to and with the said Sir *Henry*, his heirs and assigns, amongst other things, that he, the defendant, his executors, administrators, or assigns, should and would, from time to time, and at all times thereafter, fully and clearly indemnify and save harmless the churchwardens and overseers of the poor of the parish of *Elm* aforesaid, for the time being, and all and singular other the owners and occupiers of lands and tenements, and the inhabitants of or within the parish of *Elm* aforesaid, for the time being, of and from all manner of costs, rates, taxes, assessments, and charges whatsoever, for, or by reason or means of the defendant, his executors, administrators, or assigns, taking an apprentice or servant, who should thereby gain a settlement within, or become chargeable to the parish of *Elm* aforesaid;—as, by the said indenture (reference being thereunto had) will (amongst other things) more fully and at large appear. By virtue of which said demise, the defendant entered into and upon all and singular the said demised premises, with the appurtenances, and became and was possessed thereof.—The plaintiffs then, after alleging performance of all the covenants in the indenture, by the said Sir *Henry*, in his life-time, to be performed, fulfilled, and kept;—assigned for breach, that the defendant did not, nor would, from time to time, and at all times thereafter, fully and clearly indemnify and save harmless the churchwardens and overseers of the poor of the parish of *Elm* aforesaid, for the time being, and all and singular other the owners and occupiers of lands and tenements, and the inhabitants of or within the parish of *Elm* aforesaid, for the time being, of and from all manner of costs, rates, taxes, assessments, and charges whatsoever, for or by reason or means of the defendant, his executors, administrators, or assigns, taking an apprentice or servant who should thereby gain a settlement within, or become chargeable to the parish of *Elm*; but, on t

contrary thereof, he, the defendant, after the making of the said indenture, and after the death of the said Sir *Henry*, and during the continuance of the said term, to wit, on the 1st *December*, 1826, took a certain servant, to wit, one *William Lansdown*, within the true intent and meaning of the said indenture; and the said *William Lansdown*, by reason of his being such servant to the defendant, did gain a settlement within the parish of *Elm* aforesaid, and within the true intent and meaning of the said indenture, to wit, in the parish aforesaid, in the county aforesaid. The plaintiffs then averred, that the said *William Lansdown*, having so gained such settlement as aforesaid, did afterwards, to wit, on the 14th *February*, 1827, by reason of the premises, become chargeable to the said parish;—and the overseers of the poor of the parish aforesaid for the time being, by reason thereof, as such overseers as aforesaid, were heretofore, to wit, on the day and year last aforesaid, and on divers other days and times between that day and the commencement of this suit, forced and obliged to, and did, necessarily, pay, lay out, and expend, divers large sums of money, amounting in the whole to a large sum, to wit, to the sum of 100*l.*, in and about the necessary support, maintenance, and sustaining the said *William Lansdown* and his family, to wit, at the parish aforesaid, in the county aforesaid.

To this declaration the defendant pleaded seven pleas in bar; the first six concluding to the country, and on which issues were joined. In the last, the defendant alleged, that the plaintiffs, executors as aforesaid, had not, at any time since the making of the said indenture hitherto, been in anywise damnified, by reason or means of any matter, cause, or thing in the said indenture mentioned. And this, &c. wherefore, &c.

To this plea, the plaintiffs, executors as aforesaid, demurred specially, and assigned for causes, that the defendant had, in and by his said plea, attempted to put in issue,

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to be tried by a Jury, a question of law, and not of fact; and also, for that the defendant, in and by his said plea, did not plead or set forth any fact, matter, or thing, which is any bar to the declaration of the plaintiffs. And, that the defendant, in and by his said plea, confessed the declaration of the plaintiffs, and the matters therein contained, but did not in any manner avoid the same. And also, for that the plea was wholly repugnant, and in other respects uncertain, informal, and insufficient, &c. The defendant joined in demurrer.

This case was argued three times, *viz.* in *Michaelmas* Term 1828, in the last Term, and again in this Term, by Mr. Serjeant *Wilde*, for the plaintiffs, and Mr. Serjeant *Stephen*, for the defendant.

For the plaintiffs, it was submitted, that the plea demurred to was bad in substance, because it admitted a breach of covenant, but denied that any damage had actually accrued; whereas, damage is a legal consequence of the breach of covenant. But the defendant insists, that the covenant on which the action is founded, as set out in the declaration, is illegal and void. The action is well brought by the plaintiffs, as executors of Sir *Henry Strachey*, the lessor, as the covenant in question is a personal covenant, and does not run with the land, according to the distinction laid down in *Spencer's* case (*a*), between collateral covenants and such as run with the land;—the latter must be such as affect the demised land itself, and not merely the collateral interest of the lessor; and that principle was recognized and established in *Bally v. Walls* (*b*), which shews that a prejudice to the reversioner need not be certain, nor is it necessary that it should arise during the term. The covenant does not prohibit the defendant from employing apprentices or servants, but is merely

(*a*) 5 Rep, 16 a.

(*b*) 3 Wils. 25.

a covenant requiring him to indemnify the parish against any costs the overseers might be put to by reason of the defendant's taking an apprentice or servant, who should thereby gain a settlement, or become chargeable to the parish. It must be assumed that the defendant entered into the covenant voluntarily, and that he knew its purport and effect at the time the indenture was executed, and there is nothing to prevent poor persons from being employed by him in the parish of *Elm*. In the case of *The Mayor of Congleton v. Pattison* (a), where, in a lease of land, with liberty to make a water-course and erect a mill, the lessee covenanted for himself, his executors, administrators, and assigns, not to hire persons to work in the mill, who were settled in other parishes, without a parish certificate; it was held, that the covenant did not run with the land or bind the assignee of the lessee. Although the argument and judgment of the Court were confined to that point, yet that case is an express authority, to shew, that a covenant to bear a burthen occasioned by the introduction of a manufactory into a parish is valid, as it does not operate in restraint of trade. But, it may be said, that the covenant in question is an unreasonable covenant, and against the policy of the poor laws; as, by the defendant's indemnifying the parish officers, it took away from them all motives of economy, and was injurious to the due regulation and management of the poor. But, the defendant might have engaged labourers and servants, and employed them in the mill and premises demised, without making them chargeable to the parish, or conferring a settlement upon them. The only *onus* the lessor intended to throw on the defendant at the time of his contracting for the lease was, that the parish in which the premises were situate should not be burthened with additional poor; and the lessor was seised of lands within the parish, besides those de-

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(a) 10 East, 130.

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mitted to the defendant; and as it is alleged in the declaration that the plaintiff was seised in fee of the premises in question, it was unnecessary to aver or shew that he was the occupier; for, in *Bullard v. Harrison*, where, in trespass, the defendant pleaded two special pleas of justification, prescribing for a right of way, Lord *Ellenborough* said (a)—“ This record is full of a vast number of prurient novelties in pleading; and there is one that has not been touched upon in argument. For what is alleged in these pleas, that the defendant is seised in fee, and also in the occupation of the farm, every pleader knows is not usual nor necessary; for the alleging a seisin in fee virtually includes an occupation, unless the contrary be shewn.” It must be assumed, that the defendant obtained the premises at a reduced rent, in consideration of the covenant in question, and it was only to indemnify the parish against his own acts; and if he had covenanted to contribute personally to the relief and maintenance of the poor of the parish, it would be a good covenant. Although a covenant in general restraint of trade is illegal and void, yet, if there be a mere partial restraint, and founded on an adequate consideration, it is a sufficient answer to the objection; and here, the consideration was the beneficial occupation, and there is, consequently, nothing unreasonable in it. In the case of *The King v. The Inhabitants of Mursley*, Mr. Justice *Buller* said (b)—“ The master may, if he please, hire a servant for a less time than a year, for the express purpose of preventing his gaining a settlement;” and Mr. Justice *Gross* concurred in that opinion. A security given to overseers to indemnify the parish against charges to which they may be subject by the birth of an illegitimate child, is good, according to the case of *Cole v. Gower* (c). Every pauper must have a place of settlement; and, as he is entitled to relief in the parish in which he derives a settlement, the

(a) 4 Mau. & Selw. 392.

(b) 1 Term Rep. 695.

(c) 6 East, 110.

mere circumstance of locality is immaterial; and here, the defendant was not restrained from employing the poor in the parish in which the premises were situate, and the only burthen cast upon him was, that he should indemnify the parish against the expenses of those persons who should become chargeable by his own acts; and he might have any number of apprentices or servants he pleased, and employ them on the demised premises, without their gaining a settlement, or becoming chargeable to the parish.

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Mr. Serjeant *Stephen*, for the defendant.—The covenant declared on is illegal and void on three grounds:—*First*, as being in restraint of trade; *Secondly*, because it is unreasonable; and *lastly*, as being contrary to the general policy of the poor laws. *First*, it has long been an established principle, that all stipulations or contracts in restraint of trade are illegal and void, as they are against the benefit of the commonwealth; and, according to the case of *Cokgate v. Bachelar* (a), it is not necessary that there should be an absolute prohibition or restraint, for if a party be abridged of his trade and living, it is sufficient. It therefore follows, that a covenant which tends to the general discouragement of trade, is void; and a particular or partial restraint is illegal, unless it be founded on an adequate consideration. In *Hartley v. Rice* (b), it was held, that a contract, tending to discourage marriage, was illegal, as being against the sound policy of the law; and Lord *Ellenborough* said—"We have no scales to weigh the degree of effect it would have on the human mind; the distinct and immediate tendency of the restraint stamps it as an illegal ingredient in the contract." But, the leading case on this subject is that of *Mitchel v. Reynolds* (c), where it was resolved by the Court, after several arguments at the bar, that general

(a) Cro. Eliz. 872. (b) 10 East, 22. (c) 1 Peere Wms. 181.

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restraints of trade, whether by bond, covenant, or promise, either with or without consideration, are void; and that particular restraints, without consideration, are also void; and that if the consideration does not appear, so as to make the contract reasonable and useful, a Court of law will presume that it is not valid;—on the grounds, that it is not only of no benefit to the party bound, but a general mischief to the public. Here, although the covenant is not in terms in general restraint of trade, yet it tends to that end, as it prohibits the defendant from employing servants within the parish where the premises are situate. The principles established in *Mitchel v. Reynolds* have been since recognized and adopted, particularly in the late case of *Homer v. Ashford* (a), where all the previous authorities were referred to and considered. There, however, the Court were of opinion that the deed, as set out in the declaration, disclosed a sufficient legal consideration; and also, that it was a reasonable consideration. But *secondly*, the covenant in question is unreasonable. It imposes upon the defendant a liability for a term of unlimited duration, it not being restricted to the term demised, nor confined to the life-time of the parties, as the defendant covenanted for himself, his executors, administrators, and assigns, with the lessor, his heirs, and assigns. Besides, the lessor cannot prescribe a particular mode in which a lessee is to carry on his business, or the servants he may choose to employ, or the parishes or districts from which they may be engaged. *Lastly*, the covenant is void, as being against the policy of the poor laws. Although it was decided in the case of *The King v. Mursley*, that a master may hire a servant for a less period than a year, to prevent his gaining a settlement; yet here, the breach assigned is, that the defendant took a servant, who thereby gained a settlement within, and became

(a) 11 B. Moore, 91.

chargeable to the parish, and even if he had employed casual poor, he would have been liable for a breach of covenant. The covenant is not founded on a good or sufficient consideration; it tends to prohibit the defendant from employing as many servants as he otherwise would; by which the parish would be relieved from the burthen of maintaining such paupers as might enter into the defendant's service: besides which, it is highly prejudicial to the labouring classes; and Mr. Justice *Blackstone*, after enumerating the different modes by which settlements may be acquired, and referring to hiring, service, and apprenticeship, says (a): "This is meant to encourage application to trades, and going out to reputable services." The covenant in question would frustrate that object, as it would prevent the defendant from hiring servants from other parishes or districts, which would be highly injurious to them; besides which, it would hold out an inducement to the overseers of the parish of *Elm* to dispose of the funds appropriated to the relief of the poor in prodigality and waste, which is decidedly contrary to the object of the poor laws, and the office and duty of the overseers:—and Mr. Justice *Blackstone* says (b): "The two great objects of the statute 43 *Eliz.* c. 2, by which overseers are appointed, are—*first*, to relieve the impotent poor; and *secondly*, to find employment for such as are able to work, and this principally by providing stocks of raw materials to be worked up at their separate homes, instead of accumulating all the poor in one common work-house;" and here, the defendant would have found them employment, but for the prohibitory covenant in the lease.

But even if the covenant be not void, on either of these grounds, the action is improperly brought by the plaintiffs, as executors of the lessor, and therefore the declaration cannot be supported. It being alleged that the tes-

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(a) Vol. 1, 364.

(b) Ibid. 360-1.

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lator was seised in fee, and the covenant being made to him and his heirs, the action should have been brought by the heir or party beneficially entitled, who would be entitled to damages for a breach of the covenant, which affects the value of the land devised; and it does not follow, that the interest descends to the executors or personal representatives of the deceased. The premises might have been assigned to a stranger, during the life-time of the lessor, and although it is alleged that he was seised in fee, it does not appear that he was the occupier; and if not, he could not be liable to the payment of poor rates, or be chargeable to their relief. The plaintiffs, therefore, must be considered as strangers in point of interest; and although, in the *Mayor of Congleton v. Pattison*, it was held, that those covenants alone which tend directly, and not merely through the intervention of collateral causes, to improve the estate, run with the land: yet here, as was said in the argument in that case, the question is blended with the general policy of the country, which may be affected by a stipulation not to employ servants out of other parishes or districts.

Mr. Serjeant *Wilde*, in reply.—Although it has been mainly contended, that the covenant is void, its tendency being in restraint of trade, and the opinion of Mr. Justice *Blackstone* has been relied on in support of that objection, who says (a): “That the practice of accumulating all the poor in one common work-house, puts the sober and diligent upon a level with those who are dissolute and idle;” yet, if such work-houses were not established, the increase of poor rates would be incalculable. The defendant could not carry on his trade, unless he occupied the premises demised; and if he took them in the expectation of its being a beneficial occupation, he must also be subject to the restrictions imposed on him by the terms of the lease.

(a) 1 Bl. Com. 361.

The Court will presume that there was a reasonable consideration for the defendant's entering into the covenant, as in *Homerv. Ashford*. There is nothing to shew that any inconvenience or injury will result to the public from the introduction of the covenant, as it is confined to the indemnifying the parish against any paupers which the lessee might cause to become chargeable. It therefore depended on his acts alone, and he might employ poor within the parish, in such a manner as not to entitle them to gain a settlement by such service. Although it is said that the action is improperly brought by the executors of the lessor, yet there is no weight in the objection, as the covenant is a personal covenant, and does not run with the land; and as the contract was made for the personal benefit of the testator, his executors are entitled to sue for a breach of it after his death. Again, it has been urged that the covenant has a tendency to induce the overseers of the poor to misapply the funds which are raised for their support; yet, that is a remote circumstance, and it is not to be assumed that it would induce the parish officers to be guilty of a breach of duty. A question nearly similar to the present was brought before the Court of *King's Bench*, in the case of *Hill v. Eastaff* (a), on demurrer to a covenant contained in the condition of a bond given by the overseers of one parish to the overseers of another, to indemnify the latter from all costs which might be incurred by them, by reason of a person having apprenticed himself to a parishioner, and who might thereby become chargeable to the parish; and none of the objections now raised were resorted to in that case, and the Court held the covenant to be binding.

Cur. adv. vult.

Lord Chief Justice TINDAL now delivered the judgment of the Court as follows:—

(a See *post*, 470.

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The plaintiffs declared in covenant, as executors of Sir *Henry Strachey*, upon an indenture of demise, bearing date the 12th *March*, 1792, and made between the said Sir *Henry*, of the one part; and the defendant, of the other part; by which certain premises in the parish of *Elm* were demised to the defendant, for a term not yet expired, and the indenture contained a covenant, by which the defendant, for himself, his executors, administrators, and assigns, did, in and by the said indenture, covenant, promise, and grant to and with the said Sir *Henry*, his heirs and assigns, (amongst other things), that he, the defendant, his executors, administrators, or assigns, should and would, from time to time, and at all times thereafter, fully and clearly indemnify and save harmless the churchwardens and overseers of the poor of the parish of *Elm* for the time being, and all and singular other owners and occupiers of lands and tenements, and the inhabitants of or within the parish of *Elm* for the time being, of and from all manner of costs, rates, taxes, assessments, and charges whatsoever; for, or by reason or means of the defendant, his executors, administrators, or assigns, taking an apprentice or servant, who should thereby gain a settlement within, or become chargeable to, the parish of *Elm* aforesaid; and then assigned as a breach, that the defendant would not indemnify and save harmless the churchwardens and overseers of the poor of the parish of *Elm*, from all costs by reason of his taking an apprentice or servant, who should thereby gain a settlement; but on the contrary thereof, he, the defendant, after the making of the said indenture, and after the death of the said Sir *Henry*, and during the continuance of the said term, to wit; on the 1st *December*, 1826, took a certain servant, to wit, one *William Lansdowne*, within the true intent and meaning of the said indenture; and the said *William Lansdowne*, by reason of his being such servant to the defendant, did gain a settlement within the parish of *Elm* afore-

said, and within the true intent and meaning of the said indenture, to wit, in the parish aforesaid, in the county aforesaid, and, having gained such a settlement, became chargeable to the parish of *Elm*.

The defendant pleaded several pleas in bar, to the last of which there was a demurrer and joinder; and the question which ultimately arose was, whether the covenant was a valid covenant in law. It was contended, on the part of the defendant—*First*, that the plaintiffs had no interest which could authorize them to maintain an action; and *secondly*, that the covenant was void, on the grounds that it was unreasonable; that it was in restraint of trade; and against the policy of the poor laws; inasmuch, as it took away from the overseers any reason for economy, and was injurious to the poor themselves: but we do not think that any of the objections are maintainable. As to the *first*, the covenant, being an express covenant with the lessor, and not being a covenant running with the land, an action lies for the breach thereof, in the name of the personal representatives of the covenantee, who become trustees for the persons, whoever they may be, who are beneficially interested in the performance of the covenant.

As to the objections to the covenant itself, we do not think that any of the consequences above stated flow so naturally and necessarily from the observance of this covenant, as to call upon the Court to hold it to be void. It is not contended that the covenant is illegal on the ground of the breach of any direct rule of law, or the direct violation of any statute; and we think, that, to hold it to be void on the ground of its impolicy or inconvenience, we ought to be clearly satisfied that the performance of it would be necessarily attended with injury or inconvenience to the public. But such is not the case. There is nothing in the covenant which will prevent the poor generally from being employed by the defendant; he may employ as servants or appren-

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tices the poor of that parish, who may be sufficient for the service of the mill; he may employ in those capacities, the poor who have settlements in other parishes, but who have certificates from those parishes; or he may, in the case of servants, hire them for a less period than a year, and thereby prevent them altogether from gaining a settlement. There is, consequently, no general restraint of the poor from being employed in the service of the defendant in this particular parish; and as to any abstract right in a pauper to obtain a settlement in any parish he chooses to select, as he must have a settlement somewhere, the law will not consider a settlement in one parish rather than another as any benefit to the poor. If the objections urged in this case had been entitled to weight, we think they would not have been omitted in the case of *The Mayor of Congleton v. Pattison* (a); for although the question in that case was, whether the covenant ran with the land or not, this objection would at once have put an end to the action. In *Hill v. Eastaff* (b), which was argued in the Court of *King's Bench*, in *Easter Term*, 1819, where an action of debt was brought upon a bond, conditioned that the obligors, who were the churchwardens and overseers of one parish, should indemnify the obligees, who were the churchwardens and overseers of another parish, and all the inhabitants of that parish, from all costs, charges, and expenses, which might be incurred by the latter parish, by reason of one *Stevenson* having put himself apprentice to one *Moore*, in the latter parish: the Court gave judgment for the plaintiffs, and some of the objections above raised would have applied as well to that case as to the present. Upon the whole, therefore, we think that judgment should be given for the plaintiffs.

Judgment for the plaintiffs.

(a) 10 East, 230.

(b) Not reported.

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Wednesday,
July 8th.

The Earl of SHREWSBURY v. HAYCROFT.

A RULE *nisi* was obtained by Mr. Serjeant Cross, on a former day in this Term, that the writ of *testatum capias ad respondendum* which had been issued in this cause, might be set aside upon the ground of irregularity of service on the defendant. The motion was founded on an affidavit, which stated, that the writ was directed to the Chamberlain of the county palatine of *Chester*, commanding him, in the usual terms, that, by writ under the seal of the county palatine, to be directed to the Sheriff of the said county, the Chamberlain should command the Sheriff to take the defendant.

That the plaintiff's attorney served the defendant, who *resided within the city of Chester*, with a copy of the original writ, without having procured the Chamberlain's mandate to the Sheriffs of the county of the city.

The learned Serjeant submitted, that this was irregular, as the Chamberlain was only empowered to issue his mandate to the Sheriffs to take the defendant; and that such mandate should have been served on the latter.

Mr. Serjeant Jones now shewed cause, and submitted, *First*, that the Chamberlain had an exclusive jurisdiction within the city of *Chester*, and therefore, that the service of the writ, directed to him, upon the defendant within the city, was good service. Lord Coke says (a), "the county of *Chester*, (wherein the city of *Chester* is now, and by a good time past hath been, a county of itself), of very ancient time before the reign of King *Hen. 3*, hath been, and yet is, a county palatine, with other members thereunto belonging; and so, from time to time, hath been received and allowed in the law. And that by the like time

A writ of *testatum capias ad respondendum* was directed to the Chamberlain of the county palatine of *Chester*, and served by the plaintiff's attorney upon the defendant, who resided within the city of *Chester*:—*Held*, irregular, as the plaintiff's attorney did not procure the Chamberlain's mandate to the Sheriffs of the county of that city; and the Court set aside the writ.

(a) 4th Inst. 212.

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of antiquity and continuance, there hath been and yet is in the said county palatine one principal or head officer, called the Chamberlain of *Chester*, who hath, and ever had, all jurisdictions belonging to the office of a Chancellor, within the said county palatine."

Secondly, although, in *Williams v. Gregg (a)*, it was held, that a *capias*, directed into *Kent*, could not be well served in the *Cinque Ports*, and the Court there said, that writs of *capias* directed into one county cannot be served in another; yet the reason assigned was, that they were made out by different officers, and that it would make considerable confusion, if a writ issued into one county might be served in another. That, however, was not the case here:—and as the writ was directed to the Chamberlain, who was the proper officer, and had exclusive jurisdiction within the city of *Chester*, the plaintiff's attorney need not have procured the Chamberlain's mandate to the Sheriffs; and as the defendant was merely served with a copy of the writ by the plaintiff's attorney, there was no breach of duty by the officer of the Chamberlain or of the Sheriffs; and, consequently, the defendant ought not to be allowed to raise a technical objection to the service of the writ.

Lord Chief Justice TINDAL.—I am of opinion that this rule must be made absolute. The writ served upon the defendant was directed to the Chamberlain of the county palatine of *Chester*, commanding him, that, by writ *under the seal* of the county palatine, to be duly made and directed to the Sheriff of the said county palatine, he, the Chamberlain, should command the Sheriffs, to take the defendant. Instead of this, the plaintiff's attorney did not take the writ to the Chamberlain for the purpose of procuring his mandate to the Sheriffs, but served the defendant with a copy of the original process issued out of this

(a) 7 Taunt. 233.

Court. If the Chamberlain had issued his mandate to the Sheriff of the county, it would have been irregular, as the defendant resided within the city, which is a county of itself, and the mandate should have been issued to the Sheriffs of the county of that city. As, therefore, the plaintiff's attorney neglected to take the intermediate step of procuring the Chamberlain's mandate to the Sheriffs of the city, by virtue of which alone the defendant could be made liable for contempt in not obeying the process, the service of the writ in question was irregular.

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Mr. Justice PARK.—By the writ, the Chamberlain was commanded to command the Sheriff of the county of *Chester* to take the defendant; and, as the Chamberlain did not issue his mandate for that purpose, the service of the original process on the defendant was irregular, as the Sheriffs of the city of *Chester*, and not the Chamberlain, had the authority.

Mr. Justice BURROUGH concurred.

Mr. Justice GASELEE.—As the defendant resided within the city of *Chester*, the service of the original process on him there was clearly irregular, the plaintiff's attorney not having taken the intermediate step of obtaining the mandate of the Chamberlain to the Sheriffs of that city.

Rule absolute (a).

(a) In *Bracebridge v. Johnson*, 3 B. Moore, 237, a writ of *capias* directed to the Chamberlain of *Chester*, commanding him to take the defendant, was held to be irregular and void; as he is only empowered to issue his mandate to the Sheriff for that purpose. But in *Osborne v. Hancock*, 12 B.

Moore, it was held, that, if the writ be directed to the Sheriff in the first instance, instead of to the Chamberlain, and he cause the party to be arrested, it is no ground for setting aside the writ, as the Sheriff is the proper officer to execute it.

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Wednesday,
July 8th.

HAMMOND v. TEAGUE.

To a declaration of *assumpsit*, for money lent, money paid, and money had and received; the Court would not allow the defendant to plead, *first*, *non assumpsit*; and *secondly*, that the plaintiff and divers other persons had become shareholders and partners in a certain Company, and that the several sums alleged to have been lent, paid, and had and received by the defendant, to the plaintiff's use, were lent, paid, and had and received by the defendant and the other partners in the Company, for and towards the purposes and concerns of the Company; that the sums became and were part of the stock and effects of the Company, and were common to all the partners and shareholders therein: as the defendant might give in evidence all such matters under the general issue.

THIS was an action of *assumpsit*. The declaration contained counts for money lent, money paid, and money had and received by the defendant to the plaintiff's use.

Mr. Serjeant *Russell*, on a former day in this Term, obtained a rule *nisi*, to plead several matters, *viz.* *first*, the general issue, and *secondly*, that before and at the said several times in the first, second, and last counts mentioned, to wit, on &c. aforesaid, at *London*, aforesaid, the plaintiff, and divers other persons, had entered into, and become, and then were shareholders and partners together, in a certain partnership or Company, called the *Cornwall and Devonshire Mining Company*, and remained and continued such partners for a long space of time, to wit, from thence hitherto; that the said several sums of money so alleged to have been lent and advanced, and paid, laid out, and expended by the plaintiff, to and for the use of the defendant, and had and received by the defendant, to and for the use of the plaintiff, were lent and advanced, and paid, laid out, and expended by the plaintiff, and had and received by the defendant, and the said other partners in the said Company or partnership, for and towards the purposes and concerns of the said Company or partnership; and the said several sums then and there became and were part of the stock and effects of the said Company or partnership, and became and were common to all the partners and shareholders therein, to wit, at *London* aforesaid.

Mr. Serjeant *Wilde* and Mr. Serjeant *Merewether* now shewed cause.—The plea is bad in substance, and ought not to be put on the record; and even if it were good, the defendant would gain no time or advantage by

pleading it. All that can be given in evidence under that plea may be proved under the general issue, and the plea, if allowed, would be most injurious to the plaintiff, as it would tend to embarrass him; and it would be difficult to take issue upon it, as it sets up several and distinct defences to each count; and the replication must either be bad for duplicity, or admit some of the facts stated in the plea. The names of the partners should have been stated; and, as the plea is framed, it does not tend to narrow the real question to be tried between the parties; and as it merely traverses, that the money was paid, or had and received by the defendant to the plaintiff's use, whether it were so or not may be given in evidence under the general issue; and, although in *Carr v. Hinchliff* (a), which was an action of *assumpsit* for goods sold and delivered, and the defendant pleaded that the goods were sold and delivered to him by *A. B.*, the factor and agent of the plaintiff, with the privity of the plaintiff, as and for the goods of *A. B.*, and that the defendant did not know that the goods were not the property of *A. B.*; that, at the time of the sale and delivery, *A. B.* was, and still was, indebted to the defendant in more than the value of the goods; and that the defendant was ready and willing to set-off and allow the plaintiff the value of the goods out of the money so due and owing from *A. B.*: it was held, that the plea was good; yet, it was on the grounds that it confessed a right of action, and then avoided it by matter *ex post facto*; and that it was good as being matter of law, as it did not negative the facts alleged in the declaration, but was matter of defence arising out of the statute of set-off. So, in the subsequent case of *Maggs v. Ames* (b), the plea did not deny the plaintiff's right of action, or the facts stated in the declaration, but was

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(a) 4 Barn. & Cress. 547; S. C.
 7 Dowl. & Ryl. 42.

(b) 1 Moore & Payne, 294;
 S. C. 4 Bing. 470.

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matter of defence in law, arising out of the statute of frauds. Here, however, the defendant traversed all the allegations in the declaration, *viz.* that the monies were lent, or paid, or had and received by the defendant to the plaintiff's use, but that such payments were made for the purposes of the partnership concern, and became part of the stock of the Company. The plea, therefore, raises two distinct issues; it does not confess the plaintiff's right of action, and avoid it by matter *ex post facto*; nor does it answer such right by matter of law.

Mr. Serjeant *Russell* in support of his rule.—The plea is warranted by precedent, and may be supported on the authority of adjudged cases. In *Chitty on Pleading* (a), there is a form of a plea in bar, in *assumpsit*, that the contracts mentioned in the declaration were made by the defendants jointly with one of the plaintiffs, and not by the defendants separately; and in *Moffatt v. Van Millingen* (b), a plea in abatement, to the same effect, was held good on demurrer; and Mr. Justice *Buller* said—"The promise was made jointly with one of the plaintiffs. How can he sue himself in a Court of law? It is impossible to say that a man can sue himself."

[Lord Chief Justice *Tindal*.—There, the defendant did not plead the general issue.]

But, in the case of *Mainwaring v. Newman* (c), a plea, similar in terms to this, was pleaded together with the general issue, and Lord *Eldon*, in delivering the judgment of the Court, recognized the case of *Moffatt v. Van Millingen*, and said, it was unanswerable; and in *Holmes v. Higgins* (d), where a number of persons were associated together for a common purpose, and the plaintiff and defendant were both members of the association, it was held, that

(a) Vol. 2, 2nd Edit. 471.

(d) 1 Barn. & Cress. 74; S. C. 2

(b) 2 Bos. & Pul. 124, n. (c).

Dowl. & Ryl. 196.

(c) Ibid. 120.

they were partners, and Lord Chief Justice *Abbott* said—"The defendant might have pleaded that he undertook jointly with the other subscribers." This plea, therefore, is well pleaded, and will save unnecessary expense, as it tends to narrow the evidence, and confine the matters in issue between the parties to a single point.

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Lord Chief Justice TINDAL.—By refusing this application of the defendant to plead several matters, we shall not abridge or deprive him of any portion of his defence, because, all which he purposes to place on the record in the last plea, may be given in evidence under the general issue. It is said, that if we allow the plea to stand, it will avoid unnecessary expense, by compelling the plaintiff to take issue on one specific fact; and although, possibly, one issue might be taken, we ought not to involve the plaintiff in difficulty or perplexity; and it is certainly doubtful whether all the facts alleged in the plea may be answered by a single replication. Although in *Carr v. Hinchliff*, Mr. Justice *Bayley* said (a)—"I am not prepared to say, that the plaintiff might not have framed his replication so as to put in issue both the sale by the factor as alleged in the plea, and the debt stated to be due from him to the defendant. Those two facts constitute one matter of defence, and the replication suggested might probably be supported by the cases of *Robinson v. Rayley* (b) and *O'Brien v. Saxon* (c)." In *Robinson v. Rayley*, in trespass for breaking and entering the plaintiff's close, the defendant pleaded that it was parcel of a common field, and that he had right of common there; and the replication traversed, that the cattle were the defendant's cattle, and that they were levant and couchant, and commonable cattle:—the defendant demurred, assigning for causes, that the replication was multifarious, and put several matters in issue; and Lord *Mansfield*

(a) 4 Barn. & Cress. 553.

(b) 1 Burr. 316.

(c) 2 Barn. & Cress. 908; S. C.

4 Dowl. & Ryl. 579.

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said—"It is true, you must take issue upon a single point; but it is not necessary that this single point should consist only of a single fact." Yet, here, the allegations in the plea raise distinct points, on which separate issues may be taken, and it is certainly doubtful whether they can be all answered in one replication. The defendant might have a good defence to the count for money lent, but not to that for money had and received; but, as evidence applicable to all the counts may be given under the general issue, we ought not to accede to this application.

Mr. Justice PARK.—The special plea contains several distinct allegations, and raises multifarious issues; and it is doubtful to which the replication ought to be confined. I therefore think that we ought not to allow the plaintiff to be harassed, when the defendant, if he has a good defence, may give all the matters in evidence under the general issue.

Mr. Justice BURROUGH.—I am of opinion that the plea amounts in terms to the general issue, and that the defendant may give in evidence under that plea all that he could avail himself of under the special plea.

Mr. Justice GASELEE.—Before the passing of the statute of *Anne* (a), a defendant could only plead a single matter to the whole declaration, although he might plead several matters to different parts of it. But now he is permitted, *with the leave of the Court*, to plead as many several matters as he shall think necessary for his defence. In an action of *assumpsit*, a defendant may give almost every matter in evidence under the general issue, and minor branches of defence are not to be considered as several matters. But, of late years, it has been the practice of the Courts to allow a party to plead matters, which

(a) 4 Ann. c. 16, s. 4.

may be given in evidence under the general issue, if such matters raise separate and distinct grounds of defence: for instance, the general issue—and infancy or coverture, may be pleaded together, as they are not inconsistent with one another; and such a course is beneficial to both parties, as it shews the plaintiff the ground of defence on which the defendant means to rely, and thereby prevents surprise as well as the expense of proving facts which the plaintiff might otherwise think necessary. In the precedents and cases, to which we have been referred by my brother *Russell*, the pleas were, in terms, merely pleas of partnership between the plaintiffs and defendants; but here, the plea contains several distinct allegations, so as to raise a difficulty and perplex the plaintiff as to the mode in which he ought to reply. The action is brought on counts for money lent, money paid, and money had and received; and the defendant has pleaded, that the sums alleged in those counts to have been lent, paid, and had and received by the defendant, were lent, paid, and had and received by him and other partners in a Company, of whom the plaintiff was one; that the monies were applied towards the concerns of the Company; that they became part of the stock and effects of the Company; and that they were common to all the partners and shareholders therein. The defendant, therefore, asserts that these sums were no longer monies lent to, or had and received by him, to the plaintiff's use, as alleged in the declaration; and whether they were so or not, might be proved under the general issue; and therefore I am of opinion that this plea ought not to have been pleaded with the general issue; and as the defendant may give every matter in evidence that may be necessary for his defence under that plea, upon this ground, as well as on account of the multifariousness of the plea, and the difficulty of the allegations therein contained, I concur with the Court in thinking, that this rule must be

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Discharged.

1829:

Monday,
July 6th.

IN THE EXCHEQUER CHAMBER.

CAPEL and Another v. BUSZARD and Others, Assignees
of WILLIAM ROBINSON JONES and GEORGE JONES,
Bankrupts.

[In Error.]

A., by indenture, demised to *B.* a certain wharf adjoining the river *Thames*, described by abutments, with liberty to land and load goods, together with all ways, paths, passages, easements, profits, commodities, and appurtenances whatsoever to the wharf belonging or appertaining:—it was found, by a special verdict, that, by this indenture, the exclusive use of the land of the river *Thames*, opposite to, and in front of the wharf, between high and low water-mark, as well when covered with water as dry, for the accommodation of the tenants of the wharf, was demised as appurtenant to the wharf; but, that the land itself, between high and low water-mark, was not demised:—Held, that barges of *B.*, lying between high and low water-mark, and attached to the wharf by ropes, could not be distrained by *A.* for rent in arrear of the premises demised.

THIS was an action of trover for two barges. The *first* count of the declaration laid the possession in the bankrupts;—the *second* count was upon the possession of the assignees. Plea—Not guilty.

At the trial, before Lord Chief Justice *Tenterden*, at *Guildhall*, at the Sittings after *Trinity* Term, 1827, the Jury found a general verdict of not guilty, for the defendants below (plaintiffs in error), upon the first count; and, upon the second, a special verdict, stating, as to the grievances in that count mentioned, that before, and at the time of making the distress thereafter mentioned, *W. R. Jones* and *G. Jones* had become and then were bankrupts, and that the plaintiffs below (defendants in error) had been duly nominated, chosen, and appointed, their assignees; that the plaintiffs below (defendants in error) so being such assignees, before and at the time of the making of the distress thereafter mentioned to have been made, were lawfully possessed, as of their own property, as such assignees, of the barges thereafter mentioned to have been taken and distrained by the defendants below (plaintiffs in error). That, by a certain indenture, bearing date the 9th *March*, 1816, and made before the said *W. R. Jones* and *G. Jones*, or either of

them, became bankrupt, between one *Thomas Brown* of the one part; and the said *W. R. Jones* and *G. Jones* of the other part; the said *Thomas Brown* demised, leased, and to farm let, unto the said *W. R. Jones* and *G. Jones*, all that wharf, ground, and premises next the river *Thames*; and also, all that capital brick-built warehouse of three floors, erected and built thereon, abutting north on the river *Thames*, east on the premises in the occupation of *T. Flockton*, south on the street cartway and common highway leading from *Pickle-Herring Stairs* to *Horsley-down Stairs*, and west on the *Five-footway*, or *Little Wharf* for landing goods, and certain other premises in the said indenture more particularly mentioned; together with free liberty for them, the said *W. R. Jones* and *G. Jones*, their executors and administrators, during that demise, to land and load goods, wares, and merchandizes, in common with the rest of the tenants of the said *T. Brown*, at the said *Five-footway* or *Little Wharf*, fronting the river *Thames*, together with all cellars, sollars, rooms, chambers, ways, paths, passages, lights, easements, profits, commodities, advantages, and appurtenances whatsoever to the said wharf, ground, warehouse, and premises, or any of them belonging, or in anywise appertaining:—To hold the same premises, with their and every of their appurtenances, unto the said *W. R. Jones* and *G. Jones*, their executors, administrators, and assigns, from the 25th day of *March* then last past, for and during and unto the full end and term of thirteen years, at the yearly rent of 565*l.*, clear of the land-tax and all other taxes, by equal quarterly payments, payable unto the said *T. Brown* during such part of the said term as he might happen to live, and, from and after his decease, unto the person or persons who for the time being should be entitled to the freehold of the premises.

The Jury then found, that, by the said indenture, *the exclusive use of the land of the river Thames, opposite*

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*to and in front of the said wharf, ground, and premises, between high and low water-mark, as well when covered with water, as dry, for the accommodation of the tenants of the wharf, was demised as appurtenant to the said wharf, ground and premises, but that the said land itself, between high and low water-mark, was not demised:—that, before and on the 12th of November, 1826, the sum of 565*l.* of the rent aforesaid was in arrear and unpaid; and that, on that day, and at the time of making the distress therein-after mentioned, the two barges, the property of the plaintiffs below (defendants in error), as such assignees as aforesaid, were attached by ropes, head and stern, to the wharf-ground aforesaid, and were lying and being on that part of the river *Thames* opposite to and in front of the said wharf-ground and premises, and between high and low water-mark, the exclusive use of which was demised as aforesaid:—and that the defendants below, (plaintiffs in error), on the said 12th of November, as the bailiffs of the person who was then entitled to the freehold of the said wharf and premises, and was duly authorized by law to distrain for the said arrears, seized and took the said two barges, as and for a distress for the said arrears of rent, and shortly afterwards sold and disposed of the same to satisfy such arrears. But whether or not, upon the whole matter, &c. &c.*

This cause was first tried before Lord Chief Justice *Best*, at *Guildhall*, at the Sittings after *Michaelmas* Term, 1826, when his Lordship directed a nonsuit, and this Court, in *Easter* Term, 1827, discharged a rule which had been obtained for setting it aside, they being of opinion that the barges might be distrained (*a*). The plaintiffs then brought an action in the Court of *King's Bench*, which came on for trial before Lord *Tenterden*, at the Sittings after *Trinity* Term, 1827, when the Jury

(*a*) See 4 Bing. 137.

found the above special verdict; and after argument in *Banc*, in *Easter Term*, 1828, the Court of *King's Bench*, after taking time (a) to consider, gave judgment for the plaintiffs below: upon which a writ of error was brought in this Court.

The case came on for argument in the last *Hilary Term*.

Mr. *Starr*, for the plaintiffs in error (defendants below). The special verdict finds, that the exclusive *use* of the land of the river *Thames*, opposite to and in front of the wharf and ground on which the barges were distrained, was demised as appurtenant to the wharf; and although Lord *Tenterden*, in delivering the judgment of the Court below, said, that it was difficult to understand what was meant by that part of the special verdict which finds that the exclusive *use* of the land was demised as appurtenant to the wharf, but that the *land itself* was not demised; yet the finding is intelligible and capable of explanation. Lord *Coke* says (b): "If a man hath twenty acres of land, and by deed granteth to another and his heirs *vesturam terræ*, and maketh livery of seisin *secundum formam chartæ*, the land itself shall not pass, because he hath a particular right in the land; for, thereby he shall not have the houses, timber-trees, mines, and other real things, parcel of the inheritance, but he shall have the vesture of the land, (that is) the corn, grass, underwood, sweepage, and the like, and he shall have an action of trespass *quare clausum fregit*. The same law, if a man grant *herbagium terræ*, he hath a like particular right in the land, and shall have an action *quare clausum fregit*:—but, by grant thereof, and livery made, the soil shall not pass, as is aforesaid." Again, Lord *Coke* says (c)—"If a man take a lease of the

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(a) 8 Barn. & Cress. 150; S. C.
2 Man. & Ryl. 206.

(b) Co. Lit. 4 b.
(c) Ibid. 47 b.

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herbage of his own land by deed indented, this is no conclusion to say, that the lessor had nothing in the land, because it was not made of the land itself."

[Lord Chief Justice *Best*.—Lord *Coke* also says (a)—
 "If a man demiseth the vesture or herbage of his land, he may reserve a rent, for that the thing is maynorable, and the lessor may distrain the cattle upon the land."]

Here, the Jury have found an exclusive use of the land, which may be inferred from acts of enjoyment, such as making beds for the barges, or clearing out the mud at low water. Although it is an established rule, that land cannot be appurtenant to land, yet a lessor may have such a tangible interest as to support a distress, as in the case of vesture put by Lord *Coke*; and although he says (b): "Prescription doth not make any thing appendant or appurtenant, unless the thing appendant or appurtenant agree in quality and nature to the thing whereunto it is appendant or appurtenant, as a thing corporeal cannot properly be appendant to a thing corporeal, nor a thing incorporeal to a thing incorporeal." Yet Mr. *Butler*, in his note to this passage says (c)—"This position is not true. It sometimes fails as to things appurtenant. The true test seems to be the propriety of relation between the *principal* and the *adjunct*; which may be found out by considering whether they so agree in nature and quality, as to be capable of union without any incongruity (d)." Now here, the *principal* is the wharf, and the exclusive right to use the land as found by the Jury, is the *adjunct*. They both agree in nature and in quality, and are capable of union without incongruity. But this is such an exclusive use, that it may be made the subject of an action of trespass *quare clausum fregit*, although the land itself be not demised. In *Wilson v. Mackreth* (e), where

(a) Co. Lit. 47 a.

(b) Ibid. 121 b.

(c) Note 175.

(d) See 1 Ventr. 386.

(e) 3 Burr. 1824.

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the plaintiff had an exclusive right to dig turves, Lord *Mansfield* held, that he might maintain trespass against a party who disturbed his right, although he had not the absolute right to the soil. So, here, there was an exclusive use or tangible enjoyment of the land demised; and Lord *Coke*, in drawing a distinction between rights of common and exclusive rights by prescription, says (a)—“If a man claim by prescription any manner of common in another man’s land, and that the owner of the land shall be excluded to have pasture, estovers, or the like, this is a prescription or custom against the law to exclude the owner of the soil, for it is against the nature of this word common, and it was implied in the first grant that the owner of the soil should take his reasonable profit there. But a man may prescribe or allege a custom to have and enjoy *solum vesturam terræ*, from such a day till such a day, and hereby the owner of the soil shall be excluded to pasture or feed there; and so he may prescribe to have *separalem pasturam*, and exclude the owner of the soil from feeding there—*Nota diversitatem*. So, a man may prescribe to have *separalem piscariam*, in such a water, and the owner of the soil shall not fish there; but, if he claim to have *communiam piscariæ*, or *liberam piscariam*, the owner of the soil shall fish there.”

In *Hoskins v. Robins* (b), where there were conflicting rights between the lord of a manor and copyholders, it was held, that the latter might have the sole and separate pasture in the lord’s soil, so as to exclude him. Here, there is no conflicting right but that of the King, who has the middle of the river, and is owner of the soil by virtue of his prerogative, and as *parens patriæ*; but the exclusive use of the land being demised to the tenants or occupiers of the wharf, it passed such an interest to them as to enable them to sue a wrong-doer, or party entering upon it, in an action of trespass; and if so, they may have a reme-

(a) Co. Lit. 122 a.

(b) 2 Wms. Saund. 324.

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dy by distress, as a party to whom a grant is made *vestura terræ*; and here, by analogy, the sole and exclusive right was in the grantees. In *Wilson v. Mackreth*, Mr. Justice *Wilmot* drew a distinction between *exclusive* rights, and right of *common*, and said (a)—“In the former case, the grantee may *take away* thorns cut, but the commoner cannot.” Mr. Justice *Yates* said—“Wherever there is an *exclusive* right, trespass lies.” And Mr. Justice *Aston* mentioned the case of *Hoe v. Taylor* (b), where the second error assigned was, “that trespass did not lie *quare clausum fregit*; because the soil was not granted:” but all the Court held that it did lie, although they granted, that the soil did not pass: for, he who has *herbagium, pastura*, &c., shall have trespass *vi et armis*. In *Welch v. Myers* (c), the assignees of a bankrupt, who was the lessee of pasture land for a limited period, having allowed his cattle to remain on the demised premises, it was held that they thereby became tenants to the lessor, and that, for arrears of rent, he might follow and distrain the cattle, which had been removed for the purpose of avoiding the distress. There, the tenant had merely the *herbagium terræ*, whilst here, the lessees had the exclusive use of the land on which the barges were distrained. This, therefore, gets rid of the difficulty which Lord *Tenterden* experienced in delivering his judgment in the Court below, as to the demise of the exclusive use of the land, and not of the land itself. If, then, an exclusive use may be appurtenant to land demised, it is an interest on which a distress may be supported. It is, at all events, an exclusive use or an interest, for the recovery of which an assize of novel disseisin would lie. *Bracton* says (d): “*In quibus casibus omnibus subvenitur disseisito per breve de ingressu, secundum formas inferius notandas, tam super possessionibus rerum corporalium, quam super juribus*

(a) 4 Burr. 1827.

(b) Moore, 355.

(c) 4 Camp. 368.

(d) 176.

scilicet rebus incorporalibus, sicut jure pascendi, et hujusmodi, utendi, fruendi." Lord Coke, in his commentary on the statute of *Westminster* the 2nd, c. 25, with reference to the words—"et sicut prius jacuit, et locum habuit in communid pasturæ, ita de cætero in communid turbariæ, piscariæ, et aliis communibus hiis similibus," says (a)—"*Bracton*, who wrote before the making of this act, saith, '*Quod locum habet assisa de quolibet communid pertinen. ad liberum tenementum, scilicet, communia pasturæ, turbariæ,*' &c.: and in the reign of *Henry* the 3rd, which was before the making of this act, an assise did lie of a common of piscary; and these opinions had great probability of reason: yet, because there was no writ in the register in those cases, therefore, before this act no writ did lie, by the general opinion of the Judges; but now this act hath cleared the question." There is no authority to shew that a distress may be taken for the rent of a common, but the words of the statute 11 *Geo.* 2, c. 19, s. 8, comprise as well corporeal as incorporeal rights, and by which cattle and pasturage on a common, appendant or appurtenant, may be distrained for arrears of rent; and although this may be said to be a new enactment, yet it does not follow but that such cattle might have been distrained previously to the passing of that act. Here, the barges were distrained for a rent service, which not being against common right, the Court will afford every assistance to the exercise of such right. *Fleta* says (b)—"*In qualibet captione tria principaliter requiruntur; videlicet, certus locus, certa causa, et seisinâ alicujus;*" and here, these three requisites concur, as the Jury have found the use of the wharf to be an exclusive use, and the wharf itself is demised. The wharf, therefore, is *certus locus*, on which the distress might be taken; the *certa causa* is the rent in arrear; and the grantees had a *seisinâ alicujus*, for even

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(a) 2nd Inst. 412.

(b) Book 2, c. 49.

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the owner of an easement is stated in pleading to be seized as of fee. *Littleton* does not confine the remedy by distress to lands, but, in treating of tenants for terms of years, says (a): "When the lessee enters by force of the lease, then is he tenant for term of years, if the lessor, in such case, reserve to himself a yearly rent upon such lease, and he may choose to distrain for the rent in the *tenements* let, or else he may have an action of debt for the arrearages against the lessee:"—and the Jury having expressly found this to be an exclusive use, it may be included in the word *tenement*, and, therefore, does not fall within any of the instances put by Lord *Coke* in commenting on that section of *Littleton*. If the distress cannot be supported, the tenant might remove his goods from the wharf to the barges, and the Court must look at the nature of the premises; and by holding that the distress may be sustained, they will protect the landlord, who would be otherwise deprived of all remedy; and although, in *Gilman v. Elton*, Lord Chief Justice *Dallas* said (a), that goods sent to a fair, wharf, or market, are exempted from being distrained; yet his Lordship put it on the grounds of public convenience, and in furtherance of commerce.

Mr. *R. V. Richards*, *contra*.—The only question is, whether the land or ground on which the barges were distrained is part and parcel of the premises demised, or whether it was a mere easement: if the latter, it is quite clear, that the distress cannot be supported. The finding of the Jury is conclusive to shew that the land was not demised, but only an exclusive right to use it; and although Lord *Tenterden*, in giving judgment in the Court below said, that it was difficult to understand how the exclusive use could be demised and the land not, yet that, in the case, the distress could not be supported, for the following reasons:

(b) 6 B. Moore, 254.

(c) 8 Barn. & C.

reasons; *viz.* that if the land itself was demised as appurtenant to the wharf, that would be a finding that one piece of land was appurtenant to another, which, in law, could not be; and that, if, on the other hand, the meaning was, that the use and enjoyment of the land passed as appurtenant, it would be a mere privilege or easement, and the rent would not issue out of that." That is sound reasoning, and is not only warranted by law, but founded on principle:—for, Lord *Coke* says (a)—“*First*, it appeareth by *Littleton*, that a rent must be reserved out of the lands or tenements, whereunto the lessor may have resort or recourse to distrain, as *Littleton* here also saith; and therefore a rent cannot be reserved by a common person out of any incorporeal inheritance, as advowsons, commons, offices, corodies, mulcture of a mill, tithes, fairs, markets, liberties, privileges, franchises, and the like. But if a lease be made of them by deed for years, it may be good by way of contract, to have an action of debt, but distrain the lessor cannot.” Therefore, before the passing of the statute 11 *Geo. 2*, c. 19, a landlord could not distrain cattle feeding upon a common, on the ground that the common was accessory or appurtenant to the land demised. The statute is intitled, “An Act for the more effectual securing the payment of rents, and preventing frauds by tenants,” and the 8th section, empowers landlords to take and seize, as a distress for arrears of rent, any cattle or stock of their tenant or tenants, feeding or depasturing upon any common, appendant or appurtenant.” Here the soil or land between high and low water-mark belongs to the King, and the indenture of demise, as set out in the special verdict, describes the premises by metes and bounds, together with all cellars, ways, easements, profits, commodities, and appurtenances whatsoever, but the land on which the barges were distrained, did not pass under these general

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(a) Co. Litt. 47 a.

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words, for the Jury have expressly found that the *exclusive* use of the land of the river opposite to, and in front of the wharf, between high and low water mark, (where the barges were distrained), was demised as appurtenant to the wharf, *but that the land itself was not demised*. That therefore distinguishes this case from that of *Buscard v. Capel*, when it first came before the Court of *Common Pleas*. As, therefore, the exclusive use of the land only passed by the demise, such use is a mere easement; and as land cannot be appurtenant to land, the distress cannot be supported, as rent can only issue out of the land itself, and not out of an easement, or that which is accessory to land.

Mr. *Starr*, in reply.—The Jury having found that the *exclusive* use of the land was demised, this case does not fall within either of the instances put by Lord *Coke*, out of which a rent cannot be reserved. Although the exclusive use may be assimilated to a privilege, yet it is not a privilege, but an interest in the soil; and, although it may be superficial, yet it is tangible, and bears a striking resemblance to the verdure and herbage of land, which, if a man demise, reserving a rent, he may distrain the cattle upon it for rent in arrear.

Cur. adv. vult.

The Judges differing in opinion, the case stood over until this Term, when Lord Chief Baron ALEXANDER delivered the judgment of the Court as follows:—

This is an action of trover for two barges, brought by the assignees of bankrupts of the name of *Jones*, against two defendants, who were bailiffs, duly authorized, of the person then entitled to the freehold of a wharf and premises in possession of the plaintiffs below, (the defendants in error), the assignees, and who had seized the two barges, under colour of a distress for rent in arrear.

The distress was made upon the two barges lying in the river *Thames*, but attached by ropes to the wharf demised, by the principal of these bailiffs, the defendants below, (plaintiffs in error); and the only question is, whether the distress is valid. There is no doubt but that the wharf was demised, that rent was in arrear, and the distress made. But the controversy is, whether the barges were in a position or situation which rendered them liable to be distrained upon?

It is necessary to look at the terms of the demise, to determine the nature of the interest which the tenant took under the demise in the place where the barges were at the time of the distress; and then to decide, whether, by law, property in that place was liable to be distrained upon. The Jury found a special verdict, where the terms of the demise are stated. In substance, they are as follow:—By indenture of the 9th *March*, 1816, and made between *Brown*, of the one part; and the bankrupts of the other part; *Brown* demised to them all that wharf-ground and premises next the river *Thames*, and also, all that warehouse abutting north on the *Thames*, &c.: [Here his Lordship enumerated the abuttals]: together with free liberty for them, (the bankrupts), during that demise, to land and load goods in common with the rest of the lessor's tenants, at *Five-foot-way* or *Little-wharf*, fronting the river *Thames*; together with all easements and appurtenances to the said wharf and premises belonging or appertaining; to hold the same premises with their appurtenances to the bankrupts, from the 25th *March*, 1816, for the term of thirteen years, at the yearly rent of 565*l.*, payable to *Brown* quarterly:—the special verdict then stated, that, by the indenture, the exclusive use of the land of the river *Thames*, opposite to and in front of the demised wharf, between ^hhigh and low water-mark, as

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well when covered with water, as dry, was demised as appurtenant to the wharf; but that the land itself between high and low water-mark was not demised.—It has been observed, that the special verdict is, in this place, erroneous, and inconsistent with itself. It finds that the *exclusive use of the land* over which the river flows *was demised as appurtenant to the wharf*, but that the *land itself was not demised*. This inconsistency has suggested to one of the Judges the propriety of a *venire de novo*. It is agreed, that the finding is inconsistent, because a grant of the exclusive use of the land is a grant of the land. Therefore, the verdict finds that the land was demised, and that it was not demised, which is evidently an incongruity. But, still, the majority of the Judges are of opinion that there is no occasion for a *venire de novo*; such a step would, in their opinion, occasion useless delay and expense. The Jury have put a construction upon the instrument. The instrument is itself sufficiently set out upon the special verdict, and the Court can judge of its legal effect. They are now informed as exactly what the facts are, as they could be by any amendment; and, therefore, do not deem it necessary that there should be a *venire de novo*. The special verdict then proceeds:—"That, on the 12th November, 1826, the sum of 565*l.* of the rent was in arrear and unpaid; and that, on that day, and at the time of making the distress thereafter mentioned, the two barges, the property of the plaintiffs below, (defendants in error), as such assignees, were attached by ropes, head and stern, to the wharf-ground aforesaid, and were lying and being on that part of the river *Thames* opposite to and in front of the said wharf-ground and premises, and between high and low water-mark, the exclusive use of which was demised as aforesaid; that the defendants below (plaintiffs in error), on^e the said 12th of November, as the bailiffs of the person who was then entitled to the

freehold of the wharf and premises, and was duly authorized by law to distrain for the arrears, seized and took the two barges as a distress for the arrears of rent, and, shortly afterwards sold and disposed of the same, to satisfy such arrears."—Such is the special verdict. Nothing is demised but the wharf-ground and premises next the river *Thames*, and the capital brick built warehouse of three floors, erected and built thereon, together with all cellars, sollars, rooms, chambers, ways, paths, passages, lights, easements, profits, commodities, advantages, and appurtenances whatsoever, to the said wharf-ground warehouse, and premises, belonging or appertaining.

What is demised, therefore, is the wharf-ground and premises next the river, the warehouse, and the easements and appurtenances thereto belonging. The Jury tell us that it was as appurtenant that the exclusive right to the use of the land in question, over which the barges were moored, passed to the lessee.

As it is an acknowledged rule, that land cannot be appurtenant to land, it follows that the Jury drew a right inference from the deed, when they found that the land itself between high and low water-mark was not demised; and when they say, that the *exclusive use* of the land was demised for the accommodation of the tenants of the wharf, they do not mean *exclusive use* in the sense which those words import, when they are held to pass the land itself. That would be contrary both to their own express finding, and to the manifest construction of the deed itself, set out upon the record. It may be assumed as a fact, therefore, that the land over which the barges were moored, was not demised, although the land to which they were attached was demised. The question, then, comes to be, whether, by law, a distress can be made upon property situated upon land which is not parcel of the demise—land, of which the tenant has, at most, an easement.

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It cannot be denied that the law is generally understood to be as laid down by Lord Chief Baron Comyns, in his *Digest* (a), that, for rent reserved upon a lease, a man may distrain upon any part of the land out of which the rent issues, evidently implying a negative, that he can distrain *no where else*. It would, surely, be vain to contend, that the rent issued out of the soil of this navigable river. Much ancient learning has been ingeniously brought into action upon this occasion, to prove that a distress may be taken upon an easement, or a right analogous to what the tenant was supposed to have had upon the river in this case. But none of the cases cited, when examined, warrant the proposition. The total absence of all clear and direct authority upon such a point is, I think, decisive against it. I do not think it necessary to examine the *dicta* and cases which have been mentioned, in order to shew that they fail in establishing the proposition for which they have been cited.

The exceptions to the rule, that the distress must be upon the land, whether they are found in the common law, or introduced by statute, all prove the rule. The right of the lord to follow when the cattle are removed within his sight, as stated by my Lord Coke (b), is put upon this, that, in judgment of law, they are at the time within his fee. The statute of *Anne* affords a remedy where the goods are carried off clandestinely; the statute of *Geo. 2*, authorizes the landlord to distrain cattle feeding upon commons appurtenant to the land demised; all these exceptions prove the rule, that the distress must be made upon land out of which the rent of the landlord issues. There is no reason in justice for extending, by subtlety, the right of distraining, beyond what ancient law of the realm has established. If the law as contended by the plaintiffs in error (defendants b

(a) Tit. "Distress," (A 3).

(b) 1 Inst. 16'

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the barges of a stranger, moored there for a temporary purpose, with their cargoes, might be seized; which would be unjust. It has been said, that a decision, that the right of distraining does not exist upon property situated as these barges were, would be dangerous to the commercial interests of the country: I am not able to discover the danger. The landlord will have his remedy by distress upon the premises really demised, and will have, besides, his remedy upon the contract. If it be supposed that, because the soil of the river cannot be demised by the owners of the adjoining wharf, the easement or privilege of attaching their barges to the adjoining wharf would be in danger, I must say, I cannot discover the consequence. If this be an easement, as they say it is, to the benefit of which they are entitled, the law has the means of protecting men in their easements appurtenant to their lands, as well as in the lands themselves. We are therefore of opinion, that the judgment should be affirmed.

I am desired to state, that the late Lord Chief Justice of the *Common Pleas* (a), who heard the case argued, does not concur in the opinion I have delivered, but thinks that the judgment ought to be reversed; the majority of the Judges, however, are of opinion that it ought to be affirmed.

Judgment affirmed.

(a) Lord Wynford.

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IN THE
Courts of Common Pleas
AND
Exchequer Chamber,
IN MICHAELMAS TERM,
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MEMORANDA.

IN the course of the last vacation, the Honourable Mr. Baron *Hullock* died.

He was succeeded by *William Bolland*, of the *Inner Temple*, Esqr., who, on *Monday, November 16th*, was called to the degree of Serjeant at Law, and gave rings, with the motto:—" *Regi regnoque fidelis;*" and on the following day he took his seat on the Bench. He afterwards received the honour of Knighthood.

On the first day of this Term, *Thomas Pemberton*, *James Lewis Knight*, and *William Henry Tinney*, of *Lincoln's Inn*, Esquires, and the Honourable *Charles Ewan Law*, of the *Inner Temple*, Esqr., having, in the course of the last vacation, been respectively appointed his Majesty's Counsel learned in the law, they were called within the bar, and took their seats accordingly.

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Saturday,
Nov. 7th.PINERO, Gent., One, &c. *v.* JUDSON, and Another.

THIS was an action for the use and occupation of a house belonging to the plaintiff, and alleged to have been occupied by the defendants for one quarter of a year, *vis.* from *Lady-day* to *Midsummer*, 1828.

At the trial, before Lord Chief Justice *Tindal*, at *Guildhall*, at the Sittings after the last Term, the plaintiff put in the following agreement, as evidence of the holding by the defendants.

“ Memorandum of agreement, made the day of , 1823, between *Thomas Wing Pinero*, (the plaintiff), of the one part; and *Charles Judson* and *Samuel Cook*, (the defendants), of the other part. The said *T. W. Pinero*, for the considerations hereinafter mentioned, agrees to grant, seal, and execute, unto the said *Charles Judson* and *Samuel Cook*, a legal and effectual lease of all that messuage or tenement and premises situate, &c., to hold the same, with the appurtenants, unto the said *Charles Judson* and *Samuel Cook*, their executors, administrators, and assigns, from the 25th day of *March* now last past, for the term of five years, and three quarters of another year, wanting ten days, at and under the yearly rent of 80*l.*, to be made payable quarterly on the four next usual days of payment of rent in the year, without making any deductions or abatement out of the same, and under and subject to covenants, by and on the part of the said *Charles Judson* and *Samuel Cook*, their executors, administrators, and assigns, to pay the said rent, in manner aforesaid, and also the sewers rate, and all other taxes, rates, assessments, and impositions whatsoever, in respect of the said premises: to keep the premises in good and sufficient repair, (damage by fire only excepted) to paint all the outside wood and iron work of or belonging to the said pre-

By an instrument in writing, *A. B.* agreed to grant, seal, and execute, to *C. D.* a legal and effectual lease of premises for a term of years, at a certain annual rent, and subject to covenants by *C. D.*, to pay the rent and taxes, to keep the premises in repair, and to paint them every third year, and leave them in good repair at the end of the term: and *C. D.* agreed to accept the lease upon the above terms, and in the mean time, and until such lease should be made and executed, to pay the rent, and to hold the premises subject to the covenants above mentioned:—*Held*, that this was an actual demise, and not merely an agreement for a future lease.

Held also, that an action may be maintained for use and occupation, if a party hold premises under a contract or agreement, and that actual occupation is not necessary.

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mises, twice over, in good oil colours, every third year of the said term; and, at the end of the said term, to leave the said premises in good and tenantable repair, reasonable use and wear thereof, and damage by fire in the mean time only excepted. That the said *T. W. Pinero* shall have liberty to enter and view the said premises, and to give or leave notice in writing thereon, to repair all defects and decays, within three months then next following, and that the said *Charles Judson* and *Samuel Cook*, their executors, administrators, and assigns, shall do all necessary repairs in and about the premises (except damage by fire as aforesaid). And further, that the said *Charles Judson* and *Samuel Cook*, their executors, administrators, and assigns, shall not convert the said premises into a shop, or use the same for carrying on therein any trade or business whatsoever; and also a proviso for re-entry on non-payment of rent, or breach of any of the said covenants; the said lease also to contain a covenant by and on the part of the said *T. W. Pinero*, his executors, administrators, and assigns, for quiet enjoyment, upon payment of the said rent, and performance of the said covenants. And the said *Charles Judson*, and *Samuel Cook*, agree to accept and take the said lease of the premises aforesaid, upon the terms aforesaid, and to execute a counterpart thereof immediately upon the execution of the said lease, and to pay the expense of preparing the said lease, and, in the mean time, and until such lease shall be made and executed, to pay unto the said *T. W. Pinero*, his executors, administrators, and assigns, the aforesaid yearly rent or sum of 80*l.*, in manner aforesaid, and to hold the same premises, subject to the covenants above mentioned. And the said *Charles Judson* and *Samuel Cook* further agree to put the said premises into good and tenantable repair, at their own expense, and to complete all such repairs on or before the 25th day of *April* now next ensuing. And last-

ly, it is hereby mutually agreed between the said parties to this agreement, in case the said *Charles Judson* and *Samuel Cook* shall not put the said premises in such repair as aforesaid, within the time aforesaid, or if, at any time before the said lease shall be made and executed, any quarterly payments of the said yearly rent of 80*l.* shall be in arrear, and no sufficient distress be found on the said premises, then, and in either of such cases, the said *T. W. Pinero*, his executors, administrators, and assigns, shall, and lawfully may re-enter upon the said premises;— and thereupon this agreement shall be absolutely void to all intents and purposes, except only as to the recovery of the said rent so in arrear, or any satisfaction for the amount thereof. In witness &c."

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No lease was executed, and the defendants proved, that, previously to *Michaelmas*, 1827, they gave the plaintiff notice of their intention to quit at *Lady-day* following; and that they quitted before that day; and, it was contended for them, that the instrument as above set out was not an actual demise, but only an agreement for a lease to be executed thereafter; and, consequently, that the defendants must be considered as tenants from year to year, and were at liberty to determine the tenancy by quitting the premises at *Lady-day*, 1828, in pursuance of the notice given by them to the plaintiff, at *Michaelmas* preceding.

For the plaintiff, however, it was insisted, that the instrument amounted in terms to a present lease or actual demise; and therefore, that the defendants were liable under it during the whole of the term of five years and three quarters, as expressed in the agreement. The Jury found a verdict for the plaintiff, damages 20*l.*, the amount of the rent claimed.

Mr. Serjeant *Jones* now applied for a rule *nisi*, that this verdict might be set aside and a nonsuit entered instead thereof, on the grounds, *first*, that the instrument produc-

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ed in evidence by the plaintiff was only an agreement for a lease, and not an actual demise; and, *secondly*, that the form of action was wrong, as there had been no actual occupation of the premises by the defendants during the quarter for which the plaintiff sought to recover, as they quitted at *Lady-day*, 1828, pursuant to the notice given by them at *Michaelmas* preceding. *First*, admitting the rule laid down by Lord *Ellenborough*, in *Poole v. Bentley*, to be correct, *viz.* that (a) "the intention of the parties, as declared by the words of the instrument, must govern the construction;" yet the question there arose on the nature of the stamp on the instrument produced in evidence, and which was altogether distinguishable from the present case; for, although the agreement contained a clause for a lease to be granted afterwards, yet it commenced by words which could only operate as a present or actual demise, as the plaintiff thereby agreed to let, and the defendant agreed to take the premises, for a term, at a certain yearly rent. Here, however, the plaintiff only agreed to grant a legal and effectual lease of the premises; and the defendants were merely to hold until such lease should be made and executed. Besides, in *Poole v. Bentley*, the defendant agreed to lay out 2000*l.* in building within four years from the date of the agreement, and upon which Lord *Ellenborough* grounded his decision, for he said, that "the intention appears to have been, that the tenant, who was to expend so much capital upon the premises within the first four years of the term, should have a present legal interest in the term, which was to be binding upon both parties." In *Goodtitle d. Estwick v. Way* (b), a paper, containing words of present contract, with an agreement that the lessee should enter upon the premises immediately, and that leases should be executed on a subsequent day, was held to operate only as an agreement for a lease, and although here the defendants were to hold the premises until the

(a) 12 East, 170.

(b) 1 Term Rep, 735.

lease was executed, it could not operate as an actual or present demise. In *Dunk v. Hunter* (a), where a tenant was in possession under a memorandum of agreement to let on lease, with a purchasing clause, for twenty-one years, at a net rent, and the tenant was to enter at any time on or before a given day, it was held only to amount to an agreement for a future lease. In *Doe d. Coore v. Clare* (b), an instrument reciting that A., in case he should be entitled to certain premises on the death of B., would immediately demise the same to C., declaring that he did thereby agree to demise and let the same, with a subsequent covenant to procure a license to let from the lord, was held to operate only as an agreement for a lease and not as an absolute demise. In *Tempest v. Rawling* (c), an instrument, executed in *November*, setting forth the conditions of letting a farm, and the regulations to be observed by the tenant, that the term was to be from year to year, and the lands to be entered upon in *February* following, and that a lease was to be made on these conditions, with all usual covenants, was held to be an agreement for a lease, and not a present demise. In *Doe d. Jackson v. Ashburner* (d), it was held that an agreement that A. should hold and enjoy, if followed by words which shewed that the parties intended that there should be a future lease, did not operate as a previous demise, but that, whether it did so or not, must depend on the intention of the parties; and in *Morgan d. Dowding v. Bissell*, Sir James Mansfield said (e): "When a party enters into that, which, on the face of it, appears to be an agreement, though there are words of present demise, yet, if you collect on the face of the instrument the intent of the parties to give a future lease, it shall be an agreement only;" and, here, it is evident, that

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(a) 5 Barn. & Ald. 322.

(d).5 Term Rep. 163.

(b) 2 Term Rep. 739.

(e) 3 Taunt. 72.

(c) 13 East, 18.

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the parties meant that a lease should be executed, as the plaintiff only agreed to grant a lease, and the defendants were to hold until it was executed; and as no lease was afterwards prepared, they must be considered as tenants from year to year; and, if so, the tenancy was legally determined by the notice to quit. *Secondly*, the defendants are clearly not liable in this action, as there was no actual occupation by either of them after they quitted the premises pursuant to the notice given to the plaintiff, which was a legal determination of the tenancy. Although, by the statute 11 Geo. 2, c. 19, s. 14, where a demise is not by deed, a landlord may recover a reasonable satisfaction for lands held or occupied by a tenant, in an action for use and occupation; yet there must be an actual occupation:—for, in *Naish v. Tatlock*, Lord Chief Justice *Eyre* said (a)—“The statute meant to provide an easy remedy in the simple case of *actual occupation*, leaving other more complicated cases to their ordinary remedy.” And, although in *Bull v. Sibbs* (b), it was held that an occupation by a tenant of the defendant was, as far as respected the plaintiff, an occupation by the defendant himself; yet here, neither of the defendants held or occupied the premises after they quitted them at *Lady-day*, 1828.

Lord Chief Justice TINDAL.—This was an action for use and occupation, in which the plaintiff sought to recover the sum of 20*l.*, for a quarter of a year's rent, alleged to be due to him from the defendants at *Midsummer*, 1828, and the only question is, whether an instrument entered into between the parties at the time the defendants took possession of the plaintiff's premises, amounts to a demise, or only operates as an agreement for a lease to be executed thereafter, without any actual demise. If it were an agreement, its legal effect would be, that the de-

(a) 2 H. BL 323.

(b) 8 Term Rep. 327.

defendants were tenants from year to year only, and, if so, the tenancy was determined by the notice given by them to the plaintiff at *Michaelmas*, 1827, to quit at *Lady-day* following, but if it were a lease, the tenancy still subsisted, and the plaintiff will be entitled to retain his verdict. The only question, therefore, arises on the meaning and construction to be put upon the instrument, *vis.* whether it be a lease, or only an agreement for a future lease? The law has long since been settled, that, when the words of an instrument of this description are doubtful or ambiguous upon the face of it, the Court must endeavour to ascertain the intention of the parties at the time it was entered into; and this must be collected from the terms of the whole of the instrument; and if we see a paramount intent, that it shall operate as a present lease or demise, it must be so construed. Now, it appears to me, that it was clearly the intention of the parties, that the instrument in question should operate as a lease; and although it commences with the mention of the execution of a future formal lease, yet it states that the tenancy had commenced at a day previously to the signing and execution of the instrument, *vis.* on the 25th *March*, then last past. If the only stipulation was for a future lease, the instrument might perhaps only operate as an agreement; but, until a lease was prepared and executed, the defendants were to be placed in the same situation as if it had been actually executed. That appears to me to remove all doubt upon the subject. The defendants, as tenants, agreed to accept a lease of the premises upon certain terms expressed in the agreement, and to execute a counterpart immediately upon the execution of the lease, *and, in the mean time* and until such lease should be made and executed, to pay the plaintiff, as landlord, the rent of 80*l.*, in manner before specified in the agreement, and *to hold the premises subject to the covenants above mentioned.* Some of those covenants appear to me to be wholly inconsistent with a yearly

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tenancy; one of them was, that the defendants, as tenants, should paint the premises every third year; and another, to put them in repair at their own expense, and complete them before *April* then next ensuing, (the tenancy having commenced at *Lady-day* preceding), and to keep them in proper tenantable repair. These covenants would be most unreasonable, if the tenants were to occupy the premises from year to year only, but reasonable and usual for a tenant who takes for a term; and, although the parties might have meant that a formal lease should be executed, yet, in the mean time, and until it was prepared, the tenants were to hold the premises on the same terms as if it had been actually executed. This is by far the better mode of construing this instrument for the defendants, because, after they had put the premises into a proper state of repair, they could not be turned out until the expiration of the term. With respect to the other objection, that the defendants did not occupy during the last quarter, it appears to me to be disposed of by the view I have taken of the first; for, by the terms of the statute 11 *Geo. 2*, c. 19, if a tenant *holds* or occupies, he is liable to be sued in an action for use and occupation; and here, the defendants certainly held the premises under the instrument in question.

Mr. Justice PARK.—It is highly important that there should be no difference of opinion as to the construction of instruments of this description, and the Courts have long since determined that the whole of such instrument must be looked at, in order to ascertain the real intention of the parties at the time it was entered into. The intent is the only question in this case. Agreements, by which the relation of landlord and tenant are created, must constantly vary in terms; and here, although the plaintiff, an attorney, might have had some view in preparing a future lease, still, by the terms of the agreement, a present demise or holding was created, and the defendants were to

pay rent from the time of taking possession, and even before the agreement was signed. But the latter part of the instrument appears to me to remove every doubt, by which the defendants agreed to accept and take a lease, and to execute a counterpart, *and, in the mean time*, and until such lease should be made and executed, to pay the plaintiff the aforesaid yearly rent, and to hold the premises subject to the covenants above mentioned. The defendants thereby adopted all those covenants, and which are wholly inconsistent with a yearly holding, as one of them was, to put the premises in repair on taking possession, and another, to paint them every third year *during the said term*. According to this construction, our decision will be conformable to the case of *Poole v. Bentley*, where Lord *Ellenborough* said (a): "The rule to be collected from all the cases is, that the intention of the parties, as declared by the words of the instrument, must govern the construction: and here, their intention appears to have been, that the tenant, who was to expend so much capital upon the premises within the first four years of the term, should have a present legal interest in the term, which was to be binding upon both parties." That is expressly applicable to the present case, and his Lordship further observed, that "the case of *Goodtitle v. Way*, was the strongest in favour of the plaintiff's construction; in which, however, the exact date of the instrument did not appear; but the stipulation was, that leases, with the usual covenants, were to be executed before *Michaelmas*, and the rent, which was to be paid half yearly, was not to commence till *Lady-day*, though the tenant was to be let into possession immediately, which looked to a payment under the leases to be granted. The agreement also regarded several leases to be executed in future. In the case last cited, (said his Lordship), there was a clause to be added to the lease; and all the other cases contain circumstances of distinction." The case of *Goodtitle v. Way*,

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(a) 12 East, 170.

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therefore, is distinguishable from that of *Poole v. Bentley*; and here, as the defendants agreed to paint the premises every third year, and to put them in repair on taking possession, it was inconsistent with a tenancy from year to year. The second objection has been so fully answered by my Lord Chief Justice, that it will be altogether unnecessary for me to make any further comment upon it.

Mr. Justice BURROUGH.—We should in effect overturn the decision of the Court of *King's Bench*, in *Poole v. Bentley*, if we were to hold, that the instrument in question was not a lease; and I think, that that case was rightly decided, and founded on a sound principle; and, as the instrument in question contained words of present demise, we must infer, that it was the intention of the parties, that it should operate as an actual demise, although it contained a clause for a lease to be executed in future. With respect to the second objection, there was clearly a holding by the defendants, according to the terms of the statute 11 *Geo. 2*, c. 19. They took an immediate interest in the premises by the terms of the agreement, and also acquired a legal right of possession under it. That is sufficient, without actual occupation.

Mr. Justice GASELER.—It is quite time that questions as to the construction of instruments of this nature should be set at rest. There have been several vacillating and conflicting decisions. All the early authorities on the subject are collected in the case of *Doe d. Jackson v. Ashburner*, where Lord *Kenyon* said (a): “It is of great importance to the public, that some certain rule should be laid down, and that the question should not be floating; whether a particular agreement should be considered as a lease, or merely as an agreement for a lease? and this must depend on the intention of the parties, as it is to be col-

(a) 5 Term Rep. 167.

lected from the whole of the agreement. The case cited from *Cro. Car. (a)*, was properly decided; there the words were 'the defendant *shall* have and enjoy,' &c. without any others to qualify the expression. Those words were held to be sufficient to give the legal interest; they would be operative words in a bargain and sale, or in a covenant to stand seised to uses."—The subsequent case of *Poole v. Bentley* appears to me to have been decided upon a sound principle, and may be assimilated to that of *Baxter v. Brown (b)*, where the parties agreed, with all convenient speed, to grant a lease to the defendant of, and they did thereby set and let to him, &c., with a proviso that such lease should contain usual covenants on the part of the lessors and lessees, &c., and it was held to operate as a good lease *in præsentis*, with an agreement to execute a more formal and perfect lease *in futuro*. The case of *Doe d. Jackson v. Ashburner*, was decided seventeen years before that of *Poole v. Bentley*, from which it materially varies in circumstances; as, in the former, the words in the agreement were that the tenant *shall enjoy*. This holding, therefore, was to commence *in futuro*. There, too, the landlord had not all the premises in possession at the time of the agreement, as he agreed to purchase a yard afterwards. And Mr. Justice *Ashhurst* said (c)—"I entirely agree to the position, that, whether an agreement of this kind shall or shall not be considered as a lease, ought to depend on the intention of the parties, which must be collected from the words of the agreement, and from collateral circumstances. Where the words are *de præsentis*, 'I demise,' &c., or an agreement 'that the party shall hold and enjoy,' and the party is immediately put into possession, the landlord shall not afterwards turn him out of possession, and say that it was not a present demise; for the permitting the party to enter is strong evi-

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(a) Page 207, *Drake v. Munday*.

(b) 2 Sir W. Bl. 973.

(c) 5 Term Rep. 168.

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dence to shew that the landlord intended to give a present interest. But where the words themselves do not necessarily imply it, and where possession is not given, and there is no other act to manifest such an intention, then it is merely an executory contract. Now, here the words themselves import an executory agreement; for the words, 'shall enjoy,' are followed by 'I engage to give him a lease,' and 'I will purchase, &c., to be laid to the rest,' &c. And the smallness of the quantity of land to be purchased and added to the rest cannot vary the case; because the whole depends, not on what was granted at the time, but on what was to be granted afterwards. Besides, the rent is agreed upon at all events; and if this were construed to be a lease, the landlord would have a right to distrain for the whole rent, although the addition were not afterwards made by the purchase, and the only remedy left to the tenant would be by an action at law, or a bill in equity."

Where, therefore, the words in an agreement are, that a party shall enjoy from a period previous to the execution of the instrument, and that a lease shall be executed, and that, in the mean time, the tenant shall pay the rent, and hold the premises subject to the covenants mentioned in the agreement, they clearly shew, that it was the intention of the parties that there should be a holding or occupation by the tenants, and which was *in fieri* at the time the agreement was executed; and if the defendants required a more formal conveyance, they might have filed a bill in equity for a specific performance of the agreement; and that Court would, in all probability, have directed a lease of the premises to be formally executed, according to the terms of the original agreement. But I am of opinion, that the instrument in question falls within the principle laid down in *Poole v. Bentley*, *Baxter v. Brown*, and *Barry v. Nugent* (a), as it was intended by the par-

(a) 5 Term Rep. 165, n.

ties, that the agreement should operate as a present demise, with an understanding that a more formal and perfect lease should be executed afterwards, if it should be deemed requisite. With respect to the second objection, if the defendants held the premises, it was sufficient to bring them within the terms of the statute 11 *Geo. 2*, although they might not have remained in actual occupation; for, if a tenant leave premises in the middle of a quarter, which he has previously held as yearly tenant, his landlord has still a right to declare and recover for the whole of the quarter, in an action for use and occupation.

Rule refused.

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Saturday,
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THIS was an action of *assumpsit* on a guarantie. The first count of the declaration stated, that, in consideration that the plaintiff, at the request of the defendant, would take and retain one *John Corcoran* into his, the plaintiff's, employ and service, the defendant undertook and promised the plaintiff to be answerable to him for whatever *Corcoran*, whilst in the plaintiff's employ, might, as his servant, be entrusted with by the plaintiff, to the amount of 50*l.*, and, in case of any default, to make the same good. The plaintiff then averred, that he, confiding in the defendant's promise, took *Corcoran* into his, the plaintiff's, service, and retained him in such service upon the terms aforesaid, for a long time; and that *Corcoran*, whilst in such service, was, as such servant, entrusted by the plaintiff to receive, and that he did receive, for him divers sums, The defendant addressed a letter to the plaintiff in the following terms: "I, the undersigned, do hereby agree to bind myself to be security to you for J. C., late in the employ of J. P., for whatever, while in your employ, you (the plaintiff) may entrust him with, to the amount of 50*l.*, and in case of any default to make the same good." —*Held*, that there was a sufficient consideration for the defendant's promise on the face of the letter, as the employment of *J. C.* by the plaintiff was prospective, and the guarantie was given in consideration of the plaintiff's taking him into his service.

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amounting to 50*l.*; that although the time for accounting for and paying the monies by *Corcoran* to the plaintiff had long since elapsed, yet, that he, as such servant, had neglected and refused so to do, and that the defendant had not accounted to the plaintiff for, or paid, the said sum of 50*l.*, but that the same still remained unpaid.

The second count stated, that, in consideration that the plaintiff, at the request of the defendant, would retain *Corcoran* in his, the plaintiff's, employ and service, the defendant undertook to be answerable to the plaintiff as in the first count.

At the trial, before before Lord Chief Justice *Tindal*, at *Westminster*, at the Sittings after the last Term, it appeared that *Corcoran* had been in the employ of Mr. *Pearson*, an upholsterer, and that the plaintiff had agreed to take him into his service, on procuring security to the amount of 50*l.*; upon which the defendant addressed the following letter to the plaintiff:—

“ To Mr. *John Newbury*.

“ Sir—I, the undersigned, do hereby agree to bind myself to be security to you, for Mr. *John Corcoran*, late in the employ of Mr. *J. Pearson*, of *London Wall*, for whatever, while in your employ, you may entrust him with, to the amount of 50*l.*; and, in case of any default, to make the same good.

Dated, *March*, 11th, 1828.

W. Armstrong.”

The plaintiff having taken *Corcoran* into his service, and he having received various sums of money, amounting in the whole to 34*l.*, for which he failed to account to the plaintiff, the present action was commenced. The Jury found a verdict for the plaintiff for that sum.

Mr. Serjeant *Taddy* now applied for a rule *nisi*, that

this verdict might be set aside and a nonsuit entered, on the ground that there was not a sufficient or apparent consideration for the defendant's undertaking or promise on the face of the letter, in which he agreed to be security for *Corcoran*. In the case of *Jenkins v. Reynolds* (a), which bears the nearest resemblance to the present, the defendant addressed a letter to the plaintiffs, in which he said—"to the amount of 100*l.*, be pleased to consider me as security on *Cowing & Co.*'s account;" and it was held not to be a sufficient memorandum to bind the defendant under the fourth section of the statute of frauds, on the ground that the consideration for the defendant's promise or undertaking was not expressed on the face of such letter. And Mr. Justice *Park* there drew a distinction between the fourth and seventeenth sections of the statute, *vis.* that the latter only relates to contracts for the sale of property between vendor and vendee, and that the memorandum under that section sufficiently shews the consideration, *vis.* the sale of goods. But that in the fourth section, which relates to contracts made for the benefit of a third person, the particular consideration must be shewn, for it cannot be known unless it be distinctly expressed. Here, no consideration whatever for the defendant's undertaking appears; and if *Corcoran* were in the plaintiff's employ at the time the guarantie was given, there was a total absence of consideration. Although it is stated that *Corcoran* was late in the employ of *Pearson*, he might have been in the plaintiff's service at the time the letter was written; and if he were taken into his employ in consequence of the guarantie, it could only be shewn by oral testimony, which it was the express object of the statute to exclude; for, as Mr. Justice *Richardson* said, in *Jenkins v. Reynolds*—"The object of the statute is, to prevent frauds by perjury or subornation of perjury, by causing that to be reduced into

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(a) 6 B. Moore, 86; 3 C. 3 Brod. & Bing. 14.

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writing, which before might have been proved by parol testimony. In *Saunders v. Wakefield* (a), the doctrine established in *Wain v. Warlters* (b), was expressly confirmed, viz. that an agreement to be answerable for the debt of a third person must not only be in writing, but must contain the consideration for the promise, as well as the promise itself, and that parol proof of the consideration is inadmissible. Here, it does not appear that the plaintiff engaged to take *Corcoran* into his service in consequence of the defendant's guarantie, and the latter only agreed to be answerable for a default by *Corcoran* whilst he continued in the plaintiff's employ.

A mere undertaking to be answerable for *Corcoran*, whilst he was in the employment of the plaintiff, constitutes no valid or legal consideration, and there was no undertaking by the plaintiff to employ him or continue him in his service; and in the late case of *Lees v. Whitcomb* (c), where the defendant signed a paper, by which she agreed to remain with the plaintiff's wife for two years from the date of the instrument, for the purpose of learning the business of a dress-maker; in an action for the breach of the agreement, it was held that it was not binding on the defendant, as it contained no engagement or undertaking, on the part of the plaintiff or his wife, to teach the defendant. So, here, there was no undertaking by the plaintiff to employ *Corcoran*; and, if he were in the plaintiff's service previously to, or at the time the guarantie was given, there was a total absence of consideration for the defendant's engaging to be security for *Corcoran* whilst he continued in the plaintiff's employ.

Lord Chief Justice TINDAL.—By the fourth section of the statute of frauds, no action shall be brought whereby to charge the defendant, upon any special promise to answer

(a) 4 Barn. & Ald. 595.

(b) 5 East, 10.

(c) 2 Moore & Payne, 86; & C.
5 Bing. 34.

for the debt of another person, unless the agreement upon which such action is brought, or some memorandum or note thereof shall be in writing. Since the case of *Wain v. Warlters*, which has been confirmed by the subsequent cases of *Saunders v. Wakefield*, and *Jenkins v. Reynolds*, the agreement must contain the consideration for the promise, as well as the promise itself; and if no consideration be expressed, or can be implied on the face of the agreement, the party seeking to enforce it cannot recover, because parol evidence cannot be admitted. The only question in this case then is, whether the consideration for the defendant's promise is expressed on the face of his letter to the plaintiff, or whether such consideration can be raised by fair implication? I think that it may. The defendant agreed to become security to the plaintiff for *Corcoran*, whom he described as being *late* in the employ of *Pearson of London Wall*, for whatever, *while* in the employ of the plaintiff, he might entrust him with, to the amount of 50*l*. It must therefore be inferred, that the defendant undertook to be responsible for a person who had *lately* left the service of another, and *was about* to enter into the employ of the plaintiff. The word *late* refers to a past transaction, but the employment by the plaintiff was clearly prospective. The declaration is properly framed, and in which the consideration for the defendant's promise is stated to be the plaintiff's taking and retaining *Corcoran* in his service. We should not be too strict in construing instruments or contracts of this nature, as they are generally drawn up on the spur of the moment, or as occasion may require, by tradesmen and persons of business, without the aid or assistance of a professional adviser. I therefore think, that, in this case, there was a sufficient consideration expressed on the face of the letter, for the defendant's undertaking, namely, that if the plaintiff would take *Corcoran* into his employ or service, the defendant would be responsible whilst he remain-

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ed in such service, for any sum he might be entrusted with by the plaintiff, to the amount of 50*l*.

Mr. Justice PARK.—I should be extremely sorry to depart from the decision to which we arrived in *Jenkins v. Reynolds*, which is conformable to *Saunders v. Wakefield*; and the point was fully considered in both these cases. Although both Courts confirmed the principle established in *Wain v. Warlters*, still I do not say that that case was rightly decided on the facts before the Court. But the question here is—whether the undertaking by the defendant to be responsible for *Corcoran*, did not relate to his *future* employment by the plaintiff, and whilst he should continue in such service. The defendant undertook to be security for *Corcoran*, whom he described to be *late* in the employ of *Pearson*, and to be answerable for him *while* in the employ of the plaintiff, for whatever he *might* entrust him with, to the amount of 50*l*. The words *while* and *might* are clearly prospective; and I am therefore of opinion, on the construction of the agreement itself, that there is a sufficient consideration upon the face of it for the defendant's promise, *viz.* the *future* employment of *Corcoran* by the plaintiff, and entrusting him *while* in his service.

Mr. Justice BURROUGH.—The words of the defendant's letter clearly import, that, at the time it was written, *Corcoran* was about to be taken into the employ or service of the plaintiff, as it was stated, that he was *late* in the employ of another person: and the defendant's undertaking to be answerable *while Corcoran* was in the plaintiff's employ, shews, that he was not actually employed at the time; and if a consideration for a promise can be implied from the words of the agreement itself, it may be so averred in the declaration.

Mr. Justice GASELEE.—The question is, whether the

terms of the defendant's letter import that *Corcoran* was in the employ of the plaintiff at the time it was written. I think not; and the first count of the declaration states, that, in consideration that the plaintiff *would take, and retain, Corcoran* in his employ, the defendant undertook to be answerable to the plaintiff to the extent of 50*l.*, while he, *Corcoran*, continued in such employ. That appears to me, to be the true construction to be put on the defendant's letter, and more particularly as the time of the service as well as the credit to be given, are both prospective.

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Rule refused.

HERBERT, Assignee of KNIGHT, an Insolvent Debtor, v.
WILCOX and JOYCE.

Saturday,
Nov. 7th.

THIS was an action of *assumpsit*, and brought by the plaintiff, as assignee of *Knight*, an insolvent debtor, for money alleged to have been had and received by the defendants to the use of *Knight* before he became insolvent, and of the plaintiff, as his assignee, since. The plaintiff, by his bill of particulars, sought to recover 34*l.* 4*s.*, paid by *Knight*, on the 27th *September*, 1828, to the defendants, voluntarily and fraudulently, and by way of undue preference or fraud, and delivered or made over to them by *Knight*, whilst in insolvent circumstances, within three months before the commencement of his imprisonment.

At the trial, before Lord Chief Justice *Tindal*, at the last Assizes at *Bristol*, it appeared, that, in 1828, *Knight* was an inn-keeper at *Bath*, and that, being in embarrassed circumstances, he borrowed a sum of money from his sister-in-law, who had married the plaintiff; that shortly afterwards, *viz.* in *September* in that year, the whole of his stock was disposed of, and that, on the 27th of that

A voluntary payment by a debtor to his creditor, such debtor being in insolvent circumstances at the time, and within three months before his imprisonment, although in discharge of a *bond fide* debt, is a fraudulent delivery of money, and void under the 32nd section of the statute 7 *Geo.* 4, c. 57, although the word *payment* is not introduced in that section.

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month, he discharged debts which he owed to several of his creditors, and among others, he paid the defendants 34*l.* 4*s.*, for wine and spirits supplied by them in the course of their trade, and that those debts were satisfied from the sale of the stock and the sum borrowed from the plaintiff's wife. That that sum remaining wholly unpaid, the plaintiff caused *Knight* to be arrested, who, on the 13th November, 1828, rendered himself to prison in discharge of his bail, and filed his petition, and delivered a schedule to the Insolvent Debtors' Court on the 3rd December following, and obtained his discharge under the statute 7 Geo. 4, c. 57, on the 22nd January, 1830; the plaintiff having been previously appointed his assignee.

For the plaintiff, it was contended, that the payment to the defendants having been made by *Knight* when he was in insolvent circumstances, and within three months before the commencement of his imprisonment, it was fraudulent and void as against the plaintiff, under the statute 7 Geo. 4, c. 57, s. 32 (a).

For the defendants, it was insisted, that the statute was not meant to invalidate *bond fide* payments made to credi-

(a) By which it is enacted—
 "That, if any prisoner, who shall file his petition for his discharge under the act, shall, before or after his imprisonment, being in insolvent circumstances, voluntarily convey, assign, transfer, charge, deliver, or make over any estate, real or personal, security for money, bond, bill, note, money, property, goods, or effects whatsoever, to any creditor or creditors, or to any person or persons in trust for, or to or for the use, benefit, or advantage of any creditor or creditors, every such conveyance, assignment, transfer, charge, delivery, and making over, shall be deemed,

and is thereby declared to be, fraudulent and void, as against the provisional or other assignee or assignees of such prisoner, appointed under the act. Provided always, that no such conveyance, assignment, transfer, charge, delivery, or making over, shall be deemed fraudulent and void, unless made within three months before the commencement of such imprisonment, or with the view or intention by the party so conveying, assigning, transferring, charging, delivering, or making over, of petitioning the Insolvent Court for his discharge from custody under the act."

tors in the ordinary course of trade. His Lordship left it to the Jury to say whether *Knight* was in insolvent circumstances at the time he made the payment to the defendants, and whether it was a voluntary payment. They found in the affirmative, and accordingly returned a verdict for the plaintiff for the amount of the sum paid by *Knight* to the defendants.

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Mr. Serjeant *Merewether* now applied for a rule *nisi*, that this verdict might be set aside, and a nonsuit entered instead thereof. The learned Serjeant submitted, that the clause in question did not apply to *bond fide* payments made by a trader in insolvent circumstances, to his creditors, but only to fraudulent transfers of property. Although the words of the act are, "if any prisoner shall convey, assign, deliver, or make over any money to any creditor, every such conveyance, assignment, and delivery, shall be deemed void, as against the assignee;" yet, the word *deliver*, as accompanied with the other words in the clause, cannot be taken to extend to, or include, a delivery *by payment of money*. By analogy to the language of the bankrupt acts, the word *pay* would have been introduced, if the Legislature had intended to prohibit or defeat an actual payment to a creditor, although made voluntarily. The 48th section enacts—"That in case it shall appear to the Insolvent Court, or commissioner, that a prisoner has fraudulently, with intent of diminishing the sum to be divided among his creditors, or of giving an undue preference to any of the creditors, discharged, or concealed any debt due to or from the prisoner, either before or after the commencement of his imprisonment, it shall be lawful for the said Court or commissioner, to adjudge that such prisoner shall be discharged, so soon as he shall have been in custody at the suit of some one or more of the persons as to whose debts and claims such discharge is adjudicated, for such period, not exceeding three years in the whole, as the Court or commissioner shall direct, to be computed

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from the filing of the prisoner's petition;" yet here, *Knight* was actually indebted to the defendants for goods previously supplied by them in the due course of trade, and for which the payment in question was made; which, therefore, did not fall within the words or meaning of the act, nor did it amount to a fraudulent or undue preference.

Lord Chief Justice TINDAL.—The only question in this case turns on the construction of the 32nd section of the statute 7 *Geo.* 4, c. 57; and it has been insisted, that that clause does not make a voluntary payment by *Knight*, an insolvent debtor, to the defendants who were his creditors, fraudulent and void as against the plaintiff as his assignee, although it was made within three months before the commencement of *Knight's* imprisonment; and it has been contended that such payment does not fall within the operation of that clause, as the word *payment* is not introduced therein. On looking at the clause, it is impossible not to see but that the Legislature intended that it should apply to a payment of this description, for almost every word that is equivalent to payment is there inserted. The words are, "that if any prisoner, who shall file his petition for his discharge under the act, shall, before or after his imprisonment, being in insolvent circumstances, voluntarily convey, assign, transfer, charge, deliver, or make over any estate, real or personal, security for money, bond, bill, note, money, property, goods, or effects whatsoever, to any creditor or creditors, or to any person or persons in trust for, or to or for the use, benefit, or advantage of any creditor or creditors, every such conveyance, assignment, transfer, charge, delivery, and making over, shall be deemed fraudulent, and is thereby declared to be void as against the provisional or other assignee or assignees of such prisoner appointed under the act." It was, therefore, clearly intended that the delivery of money by a person in insolvent circumstances to a particular creditor, is fraudulent and void as against

the assignee of the insolvent. The delivery of money to a creditor must be taken to be a delivery in payment for demand of a debt; and the word *delivery* may, in this respect, be considered as synonymous to payment, and if a payment of money to a particular creditor, being for his advantage, be not deemed to be void, the provisions of the statute would be altogether nugatory; and although the word *payment* is not introduced, it appears to me that the payment in question was a voluntary and fraudulent delivery of money to a creditor, within the terms and meaning of the 32nd section of the act.

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Mr. Justice PARK.—My brother *Merewether* has said, that, as the word *payment* is not introduced in the clause in question, the payment made by the insolvent to the defendants cannot be considered as a voluntary preference, or fraudulent within the meaning of the statute; but I am not prepared to go that length, or to say that precise words should be inserted, in order to bring a party within the meaning or operation of the act. Such precision is applicable rather to penal or criminal statutes than those which are remedial, and passed for the prevention of fraud, and a security to *bond fide* creditors. The object of the Legislature in passing the act in question was, to effect a fair and equal distribution of the estate and effects of an insolvent among his creditors at large, and the 32nd clause enacts, that if he should voluntarily convey, assign, transfer, charge, *deliver*, or make over any of his real or personal estate, security for money, *money*, goods, or effects whatsoever, to any creditor;—every such conveyance, assignment, &c. &c., is void as against the assignee. As many verbs are used as can well be enumerated, and the words *deliver*, or *make over*, are not confined to a security for money, but include *money* also. The Legislature, therefore, intended that a person in insolvent circumstances should not voluntarily deliver over money

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to a particular creditor, and such delivery appears to me to comprehend and be tantamount to payment.

Mr. Justice BURROUGH.—I am also of opinion that the words of this statute, as well as the true meaning to be put upon them, are sufficiently comprehensive to embrace this case, and consequently, that there is no ground to disturb the verdict found for the plaintiff.

Mr. Justice GASELEE.—The intent of the Legislature was, that if any person, being in insolvent circumstances, should, within three months before the commencement of his imprisonment, voluntarily deliver any security for money or other property, either in money or in money's worth, it should be taken to be within the meaning of the act; and the delivery of money to a particular creditor must be considered as a payment made in satisfaction of a debt due to him to the prejudice of the creditors at large.

Rule refused.



Tuesday,
Nov. 10th.

SAUNDERS v. MILLS.

In order to justify the publication of a report of a cause tried in a Court of justice, the report must contain a fair and accurate statement of what

took place at the trial. A mere statement by counsel, in his opening to the Jury, unsupported by evidence, is not a fair and impartial report. In an action for a libel in a newspaper, the defendant was permitted, under the general issue, to shew in mitigation of damages, that he had copied the alleged libel from another newspaper, but he is not allowed to shew that it had also previously appeared in several other newspapers. The question of damages in such a case, is exclusively a question for the Jury.

THIS was an action brought by the plaintiff, an attorney at *Bristol*, against the defendant, as printer and publisher of a newspaper, called the "*Bristol Gazette*," for the following libel inserted in that paper:—

"Extraordinary charge of poaching.—*Gloucester As-*

sizes.—At the above Assizes, an action was brought by Lord *De Clifford* against Mr. *Saunders*, an attorney of *Bristol*, and two other persons, under these circumstances, as stated by the counsel for the prosecution. The defendant had taken a cottage on the borders of Lord *De Clifford's* preserves, where he kept a regular poaching establishment. Fair sporting was out of the question, for it appeared that he used to turn out his dogs in the night, when they did much mischief on the neighbouring estate. In consequence of this, Lord *De Clifford* gave orders that all dogs caught on his manors, should be brought into the kennel, and there kept till they were claimed. It happened that a greyhound of the defendant's was found in one of Lord *De Clifford's* fields, and was taken to the kennel to wait its being claimed by the owner, as it was not certainly known to be a dog of the defendant's. Instead of writing to Lord *De Clifford* to have the dog delivered up, the defendant went with two other persons on the 23rd day of *October*, and having broken open the door of Lord *De Clifford's* dog kennel, he rescued the dog. These parties came the next day to dig up the body of a dead dog. Mr. *Saunders* had a horse pistol, and they then insulted Lord *De Clifford's* servants, and Mr. *Saunders* challenged one of the keepers to fight. The actual injury to the kennel door was not much, but damages were sought to be recovered, which would teach the defendant to behave more correctly in future. The defence was, that the defendant had done no more than was necessary for the recovery of his dog; and that another dog of Mr. *Saunders's*, having been shot by one of Lord *De Clifford's* keepers, and buried, they merely went on the second day, to dig up the body of that dog, and bring it away. Mr. Justice *Park* said, that the amount of damages was not necessarily limited to the actual damage done to the door of the dog-kennel; but still he thought the Jury should give just such damages as would not be

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very injurious to the defendant's pocket, but yet as much as might have the effect of making him mend his ways, and behave with more propriety in future. Verdict for the plaintiff, damages 50*l*."

At the trial, before Lord Chief Justice *Tindal*, at *Westminster*, at the Sittings after the last Term, the defendant pleaded the general issue; and it was admitted that he was the editor of the *Bristol Gazette*, as well as that the alleged libel was published in that newspaper; and he gave in evidence a copy of the *Observer* newspaper, of a date preceding the publication in the defendant's paper, for the purpose of shewing that the libel had been published in the *Observer*, and copied, in substance, from that paper. He also offered in evidence copies of the *Morning Herald*, and several other *London* newspapers, in order to shew that the same report had been published in them; but his Lordship refused to receive them. The defendant then gave in evidence a letter written by him to the plaintiff containing an explanation or apology for the publication of the report; but, as it appeared that such letter had been before published in the *Observer*, and in terms rather tending to add to than diminish the effect of the original statement or report, his Lordship left it to the Jury to say, whether the report, as published in the defendant's paper, was, upon the face of it, a fair and accurate report of what took place at the trial at *Gloucester*. They thought that it was not, and found a verdict for the plaintiff, damages 50*l*.

Mr. Serjeant *Ludlow* now applied for a rule *nisi*, that this verdict might be set aside, and a new trial granted, on the following grounds: *First*, that the publication appearing on the face of it to be the report of a trial in a Court of justice, was a privileged publication. *Secondly*, that the copies of newspapers, in which the same report had been previously published, were improperly rejected, or refused

to be received in evidence in mitigation of damages; and, *Lastly*, that the damages were excessive.

First. The editor of a newspaper or periodical journal is justified in publishing an account of what takes place in a Court of justice, which is open to all the world; and a party who complains of such publication, must adduce some evidence of malice in the publisher, either in fact or in law; and he cannot rest his case on the mere fact of publication. Here, the plaintiff adduced no evidence of malice, nor can malice be inferred; and the publication of the report of what took place at the trial at *Gloucester*, was, *prima facie*, a privileged publication. In the case of *The King v. Wright*, Mr. Justice *Lawrence* said (a)—“It has been said, that the publication of the proceedings of Courts of justice, when reflecting on the character of an individual, is a libel; to support which position, the case of *Waterfield v. The Bishop of Chichester* (b), has been cited. But, on examining that case, it appears, that the charge there was, that the plaintiff had not published a true account. Therefore, I do not think that that case establishes the proposition, to support which it was cited; and I am not aware of any authority that does support it. The proceedings of Courts of justice are daily published, some of which highly reflect on individuals; but I do not know that an information was ever granted against the publishers of them. Many of these proceedings contain no point of law, and are not published under the authority or the sanction of the Courts, but they are printed for the information of the public. Though the publication of such proceedings may be to the disadvantage of the particular individual concerned, yet it is of vast importance to the public that the proceedings of Courts of justice should be universally known. The general advantage to the country in having those proceedings made public, more than counterbalances the in-

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(a) 8 Term Rep. 297.

(b) 2 Mod. 118.

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conveniences to the private persons whose conduct may be the subject of such proceedings." So, in *Curry v. Walter* (a), (to which that learned Judge alluded), which was an action for publishing a libel on the plaintiff in the *Times* newspaper, under the title of "Law Reports" Lord Chief Justice *Eyre*, in summing up, told the Jury—"That though the matter contained in the paper might be very injurious to the character of the plaintiff, (a magistrate), yet he was of opinion, that it being a true account of what took place in a Court of justice, which is open to all the world, the publication of it was not unlawful." Here, the plaintiff did not attempt to shew that the report of what took place at the trial at *Gloucester* was either unfair or untrue, or that the defendant was actuated by malice in its publication. In the late case of *Bromage v. Prosser*, Mr. Justice *Bayley*, in delivering the judgment of the Court, lays down the true distinction between cases of ordinary libel or slander, and those which are in the nature of a privileged communication, under which the publication of what has taken place in a Court of justice may be classed; and he said, with reference to that distinction (b), "malice, in common acceptation, means ill will against a person; but, in its legal sense, it means a wrongful act, done intentionally, without just cause or excuse. And I apprehend the law recognizes the distinction between these two descriptions of malice, *viz.* malice in fact, and malice in law, in actions of slander. In an ordinary action for words, it is sufficient to charge that the defendant spoke them *falsely*, it is not necessary to state that they were spoken *maliciously*. But in actions for such slander as is *primâ facie* excusable on account of the cause of speaking or writing it, malice in fact must be proved by the plaintiff." So, here, as the defendant published a report of what purported to

(a) 1 Bos. & Pul. 525.

(b) 4 Barn. & Cress. 255; S. C. 6 Dow. & Ryl. 296.

have passed at a trial at the Assizes, it was in the nature of a privileged communication, and the plaintiff should either have shewn that the statement was false, or that the defendant was actuated by a malicious feeling towards him, but which could not be the case, as he published the matter complained of as a statement made by counsel at the trial of a cause at *Nisi Prius*, and after it had been inserted in other newspapers besides the *Observer*.

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Secondly. The newspapers in which the alleged libel had been previously published, were improperly rejected when offered in evidence, as they were not tendered by the defendant for the purpose of justifying the publication, but only in mitigation of damages; and, in the case of *The Earl of Leicester v. Walter (a)*, the defendant was allowed to prove, under the general issue, in mitigation of damages, that before, and at the time of the publication of the supposed libel, the plaintiff was generally suspected to be guilty of the crime imputed to him. So, in ——— v. *Moor (b)*, in an action of slander, imputing a specific charge of unnatural practices to the plaintiff, the declaration contained the usual allegation of good fame, &c.; the defendant, upon cross-examination, was allowed to ask the plaintiff's witness, whether he had not heard reports in the neighbourhood, that the plaintiff had been guilty of similar practices, with a view to diminish or mitigate the damages; and such evidence was deemed to be admissible, on the ground, that a person of disparaged fame is not entitled to the same measure of damages as another whose character is free from stain and unblemished: and, in *Wyatt v. Gore (c)*, in an action for a libel, to which the general issue only was pleaded, it was held, that the defendant might give in evidence in mitigation of damages, not only that there were reports of the same tenor as the libel, previously current, but also, that the substance of

(a) 2 Camp. 251.

(b) 1 Mau. & Selw. 284.

(c) Holt's Ni. Pri. Cas. 299.

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the libellous matter had been published in a newspaper; and, further, that he was not required to produce such newspaper at the trial. That case was decided by Lord Chief Justice *Gibbs*, and shews, at least, that the newspaper itself, if produced, would have been admissible in evidence, to prove the previous publication of the substance of the libel charged in the declaration. The late case of *Jones v. Stevens* (a), in the Court of *Exchequer*, is distinguishable from the present, as there it was proposed, under the general issue, to give evidence of the plaintiff's bad character and ill repute in his business as an attorney, to contradict the allegation in the declaration, that he had carried on such business with credit and reputation.

Lastly. At all events, the damages found by the Jury were excessive, as the defendant not only inserted the alleged libel in his newspaper, as a statement made by counsel in a Court of justice, but he copied it in substance from another newspaper, in which it had been previously inserted; and it had also found its way into several other papers, which might and ought to have been received in evidence, and which, in all probability, would have had great weight with the Jury, as it would, at all events, have shewn that the defendant was not actuated by a malicious or vindictive feeling towards the plaintiff, in the publication of the report in question.

Lord Chief Justice TINDAL.—I am of opinion that this rule ought not to be granted. The application for a new trial has been made on three grounds; *first*, that the evidence adduced by the plaintiff was not sufficient to entitle him to a verdict, as he ought to have proved either that the publication in question was an incorrect account of the proceedings in a Court of law, or that the defendant had been actuated by malice in publishing the alleged

(a) 11 Price, 235.

libel; *secondly*, that evidence in mitigation of damages, was improperly rejected at the trial; and *lastly*, that the damages were excessive.

With respect to the *first*, which is the main ground on which the application is founded, what I am about to say will not interfere with or trench upon the generally received doctrine, that the editors of newspapers are, to a certain extent, privileged in the publication of proceedings which take place in Courts of justice. Such publications are extremely beneficial to the public at large, and tend to the due administration of justice;—but they must be restricted to fair and *bond fide* statements. In this case, it must be evident to every one who reads the report published in the defendant's paper, that the libel complained of is an *ex parte* statement, and not a fair communication to the public, or candid report of what took place at the trial. The report begins by stating, that an action was brought by Lord *De Clifford*, against the present plaintiff, under circumstances, *as stated by the counsel for the prosecution*, but it does not profess to state the nature of the evidence adduced at the trial, or that it was consistent with the statement so made by counsel. *Ex parte* statements are frequently made to counsel previously to action brought, or before the day of trial, which are detailed by them in their opening to the Jury, but which are not supported by the evidence. It is not, therefore, safe or proper, after a cause has been tried, to allow the publication of a mere preliminary statement by counsel, to go forth to the world, through the medium of a public newspaper, if such statement be unsupported by evidence. Although, therefore, the editor of a newspaper or periodical journal may be privileged in the publication of what takes place in Courts of justice, yet, unless it be a fair and candid report, the law will not sanction or authorize it. But here the report does not import upon the face of it, to be a fair and true account of the trial. It merely professes, at the commencement, to give the circum-

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stances as stated by counsel for the prosecution, and then goes on to say, that the then defendant, (the present plaintiff), had taken a cottage on the border of Lord *De Clifford's* preserves, where he kept a regular poaching establishment. This was not the language of a witness, it could only be the language of counsel in aggravation of the cause he was called on to support on behalf of his client. The report then proceeds to state, that fair sporting was out of the question, for *it appeared*, that the defendant used to turn out his dogs in the night, when they did much mischief on the neighbouring estate. The writer therefore changed the character of the report, by mixing up matter of fact with the statement of counsel, as he professed to shew that it *appeared* in evidence that the defendant used to turn out his dogs in the night, when, in point of fact, no such evidence was given. The person who furnished the report, then says, that, in consequence of this, Lord *De Clifford* gave orders that all dogs caught on his manors should be brought into the kennel and there kept till they were claimed. It is uncertain whether that sentence refers to what was proved at the trial, or to the mere statement of the plaintiff's counsel. But, in order to make it a fair and impartial account of what took place at the trial, the nature of the defence should be set out with the same degree of fairness and impartiality as the charge. But, instead of this, the observations of the writer were confined to the single point on which the defence rested, *viz.* that the defendant, in committing the trespass complained of, had done no more than was necessary for the recovery of one of his dogs; and the learned Judge, in his charge to the Jury, appears to have summed up against the character and conduct of the then defendant (the present plaintiff). This, I say, cannot be considered a fair and impartial account of what took place at the trial at *Gloucester*. I commented upon it at the trial of this cause, and left it to the Jury to say, whether or not, upon the face of the report, it was a

fair account of the trial at the Assizes, but I do not wish to infringe or break in upon the general supposed principle, that a fair publication by editors of newspapers, of proceedings in a Court of justice, ought to be allowed, but I did not think that the statement in this case could be so considered, nor did the Jury believe that it was a fair and impartial account of what took place at the trial, or that it even imported to be so; and I think they were warranted in coming to the conclusion they did.

Secondly, it has been said, that evidence in mitigation of damages was improperly rejected at the trial of this cause, as the alleged libel had been previously published in terms, in other newspapers. But, as there was no justification or excuse upon the record, I thought I went the full length by allowing the *Observer* newspaper, from which the alleged libel was stated to have been copied, to be given in evidence. That might have had great weight with the Jury, as tending to shew that the defendant had been actuated by less malice in the publication than might have been imputed to him, had he been the original writer or publisher of the libel. But I think, that evidence of a similar publication in other newspapers, with which the present defendant, as editor of the *Bristol Gazette*, had nothing whatever to do, ought not to have been received, and that I was justified in refusing it. The plaintiff had his election to proceed by action against either of the papers in which the libel was published.

Lastly. With respect to the damages being excessive, it was a question purely for the consideration of the Jury; and, unless they be manifestly excessive and exorbitant, the Court ought not to interfere. The defendant offered in evidence a letter, by way of apology to the plaintiff for the insertion of the statement in question in his paper, but it appeared to have been previously published in the *Observer* newspaper, and, so far from its being an apology, the Jury thought that it added to the bitterness of the attack originally made on the plaintiff.

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Mr. Justice PARK.—I am of the same opinion. It has been admitted by my brother *Ludlow*, that the publication of the statement complained of in the defendant's newspaper, imputes a libel on the plaintiff. It charges him with having kept a regular poaching establishment, and turned out his dogs in the night, when they did much mischief on the neighbouring estate. But it has been said, that the defendant is justified in the publication, as it is a report of proceedings which took place in a Court of justice. I admit that such a report is not a libel; but, in order to exempt the publisher from the consequences attached to its publication, it must be a fair and impartial report. All the cases on this subject shew not only that the report must be fair, but accurate. In *Stiles v. Nokes (a)*, where the names of the real parties to the suit were, for some reason, concealed, and the defendant published a highly coloured account of judicial proceedings, mixed with the party's own observations and conclusions upon what passed in Court, which contained an insinuation that the plaintiff had committed perjury, it was held to be libellous; and Lord *Ellenborough* considered the question as my Lord Chief Justice has now done, and said—"The account of the proceedings in Court is so interwoven with the comments, that we cannot with certainty separate them throughout, although we can see plainly enough that certain parts are an overcharged account of the judicial proceedings." So, here, although the counsel for the prosecution might, in his address to the Jury, have said that the defendant, the now plaintiff, kept a poaching establishment, yet that statement was not supported by the testimony of any witness, nor was any evidence adduced to prove it. This, therefore, cannot be considered a fair and impartial account of what took place at the trial, and I am consequently of opinion, that the defendant was not justified in publishing it,

(a) 7 East, 493.

according to the authority of previous decisions. But, even if a statement be fair and true, its publication ought not to be allowed in all cases; for I cannot accede to the position that a party may be excused for publishing every proceeding in a Court of justice. In the case of *The King v. Creeney* (a), the character of a revenue officer was attacked in Parliament by one of the members of the House of Commons; and although it was admitted that, in his character as such, he was privileged in speaking what he thought to be material, as a member of the House, still, as he had not stopped there, but chose, unauthorized by the House, to publish an account of that speech in a newspaper, in what he termed a more corrected form, and in that publication threw out reflections injurious to the character of an individual, it was held, that he had no right to reiterate these reflections to the public, and that he was liable to be convicted upon an indictment for a libel, in publishing the report of such speech in a newspaper, although the publication was a correct report of the speech, and made in consequence of an incorrect publication having appeared in that and other newspapers. So, in the late case of *The King v. Mary Carlile* (b), it was held to be unlawful to publish an account of the proceedings in a Court of justice, if such account contained matter of a scandalous, blasphemous, or indecent nature, although every word of it might be true. And Lord Chief Justice *Abbott* said (c)—“There can be no doubt in the mind of the Court, or of any person acquainted with the law of the country, that if, in the course of a trial, it becomes necessary, for the purposes of justice, that matters of a defamatory nature should be publicly read, it does not therefore follow that it is competent to any person, under the pretence of publishing that trial, to re-utter that defamatory matter.” And Mr. Justice *Bayley*

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(a) 1 Mau. & Selw. 273.

(b) 3 Barn. & Ald. 167.

(c) Id. 168.

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said—"We are bound, for the purpose of justice, to hear evidence in the course of judicial proceedings, the publication of which, at any distant period of time, or at any time afterwards, may have the effect of an utter subversion of the morals and religion of the people. It very often happens, that, for the purposes of justice, our ears may be shocked with extremely offensive and indelicate evidence. But, though we are bound, in a Court of justice, to hear it, other persons are not at liberty afterwards to circulate it, at the risk of those effects, which, in the minds of the young and unwary, such evidence may be calculated to produce." Now, here, so far from this report being a fair account of what took place at the trial, it is a mere garbled report, as it only professes to be an *ex parte* statement made by the counsel for the prosecution.

With respect to the rejection of evidence by my Lord Chief Justice on the trial of this cause, I am clearly of opinion that it ought not to avail the defendant. Although the admissibility of evidence of the general character of a plaintiff, in an action for a libel, in order to contradict the usual allegation in a declaration of his good name and reputation, with a view to mitigating damages, on the general issue, or a plea of justification, had for a long time been a *veraxta quæstio*, yet Mr. Baron Wood, in a most luminous and elaborate judgment in the case of *Jones v. Stevens*, and for which he received thanks and congratulations from the Court of *Exchequer*, said (a)—"I have ever understood, that general good character is always presumed in law; unless, by evidence of particular acts, fairly and specifically put in issue, that presumption is negatived. Some cases have been mentioned, wherein it should seem, that such evidence has been received at *Nisi Prius*. I will not attempt to distinguish the present case from those. I strongly pro-

(a) 11 Price, 272.

test, however, against any such mischievous doctrine altogether; and deny that it has any legal foundation. It cannot be supported on any principle of law. I say, distinctly, that it is not warranted by the law of the land, and whatever cases may be cited to support such doctrine, I cannot assent to them. When I am told by the House of Lords (who, I presume, would take and act upon the opinions of the Judges), that such is the law, I will then, (as I must) submit to consider it to be the law; but certainly not till then. If, as contended for, you could call witnesses, upon the plea of not guilty, to contradict the general introductory words, upon pretence of mitigating damages, what would be the consequence? We should have counsel getting up, and saying—‘The plaintiff has alleged’ (as in the present declaration) ‘that he is a good, honest, just, and faithful subject of the realm. I propose to call twenty witnesses, to prove that he is an immoral dissolute man; twenty more, to prove that he has committed acts of dishonesty; twenty more, to prove that he is not just in his dealings; and twenty more to prove that he is not a faithful subject, by proving that he has been guilty of sedition, treasonable practices, and even high treason.’ Did any one ever hear such stuff as this? It might do in a farce upon the stage, meant to excite laughter, but it surely cannot be tolerated in a Court of justice.”—My Lord Chief Justice, in this case, admitted evidence which might weigh with the Jury in mitigation of damages, *viz.* a copy of the *Observer* newspaper, from which the libel was said to have been copied; but its publication in other papers, of which the defendant did not profess to have any knowledge, appears to me to have been most properly rejected; because, if admitted, it could not have operated as an extenuation of his conduct in publishing the libel in his own paper.

Mr. Justice BURROUGH.—After what has fallen from my Lord Chief Justice, and my Brother *Park*, I shall make

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but a very few observations. I am clearly of opinion, that the report, as published in the defendant's newspaper, is a libel upon the face of it. It does not profess to be a full or accurate account of what took place at the trial, either from the course of the proceedings or the nature of the evidence, but from the mere statement of the counsel for the prosecution. Besides, the defendant only pleaded the general issue, and did not contradict, or attempt to justify the libel, as set out in the declaration, and it clearly is a libel in terms. I am therefore of opinion, that the first and main objection falls to the ground. *Secondly*. Although my Lord Chief Justice admitted the *Observer* newspaper in evidence, to shew that the alleged libel was, in substance, copied from that paper, yet he was not bound to admit other newspapers, to shew that it had been published in them also. Editors of newspapers should and ought to take care, not only to publish what is true, but statements made to them by their reporters should be fair and impartial; and if the defendant, in this case, had pleaded, in justification, that the report in question was a fair and accurate account of what took place at the trial, such a plea would have been bad on demurrer. But the libel, as set out in the declaration, has not been attempted to be justified by the defendant, and there is, consequently, no ground for this application.

Mr. Justice GASELEE.—The only point on which I have entertained any doubt is, as to how far the defendant might be entitled, under the general issue, to offer evidence that the report published in his newspaper, had been previously published and circulated in others. It appears on the face of the report, that the statement was not made on evidence adduced at the trial, but from what fell from the counsel for the prosecution; and although the defendant might have copied the statement from the previous report in the *Observer* newspaper, which was admitted in evidence,

he was not justified to give in evidence other papers, unless he had shewn that he had known that the report had been previously published in them. In the case of *The Earl of Leicester v. Walter* (a), which was an action for a libel, it was held, that, under the general issue, the defendant might prove, in mitigation of damages, that, at the time the libel was published, the plaintiff was generally suspected to be guilty of the crime thereby imputed to him; and Sir *James Mansfield* said—"It seems to have been decided in several cases, that if you do not justify, you may give in evidence any thing to mitigate the damages, though not to prove the crime which is charged in the libel." Cases in which the like point has been decided, have frequently come under my observation during my practice at the bar; but I remember a case in *Somersetshire*, where, in an action for a libel for mis-stating the report of a trial in a newspaper, I wished to give in evidence a previous report of the same trial in another paper; yet it was refused, on the ground that the defendant did not shew that he had any knowledge of the publication in that paper, before it was offered in evidence. Here, as far as regards the merits of the case, a copy of the *Observer* was admitted in evidence for the defendant, which might have had great weight with the Jury; and although it is doubtful whether matters of excuse may be given in evidence under the general issue, yet here, the defendant has neither pleaded nor offered to prove any thing that could operate as an excuse or justification for publishing the report in question, and which is a libel upon the face of it, as it does not appear to be a fair report of the proceedings at the trial. In the case of *Snowdon v. Smith* (b), it is stated to have been ruled by Mr. Justice *Chambre*, that, on a plea of justification, that the plaintiff had been guilty of a crime imputed to him, a wit-

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(a) 2 Camp. 251.

(b) 1 Mau. & Selw. 286, n.

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ness could not be asked whether reports concerning the plaintiff, such as the defendant stated he had heard, had not gone abroad. And, in *Waithman v. Weaver* and Others (a), which was an action for a libel against the proprietors and printers of a newspaper, for a libel, attributing to the plaintiff the fact of having purchased goods from a man of suspicious character, for a small sum, which the plaintiff had sold to another person at a higher price on the preceding day, the defendant's counsel proposed to call witnesses to prove that the libel, in this respect, was no more than a repetition of rumours which were prevalent at the time of the facts imputed to the plaintiff in the libel, in order to diminish the damages; and Lord Chief Justice Abbott is represented to have said, that he was not satisfied that he ought to receive the evidence, and that he had always had doubts as to the decisions in the cases adverted to, which were those of *Knobell v. Fuller* (b), *Eamer v. Merle* (c), *The Earl of Leicester v. Walter* (d), and *Williams v. Callender* (e).

Rule refused.

(a) 11 Price, 257, n.

(b) Peake on Evidence, 308.

App. xliii. 5th Edit.

(c) 2 Camp. 253, n.

(d) Id. 252.

(e) Holt's Nl. Pri. Cas. 307, n.

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CROSS v. BARTLETT.

THIS was an action of *assumpsit*, and brought against the defendant, for the breach of a warranty of his mare. The declaration stated, that, in consideration that the plaintiff, at the request of the defendant, would deliver to the defendant a certain horse of the plaintiff, of the value of 13*l.*, and would also pay to the defendant the sum of 25*l.*, in exchange for a certain mare of the defendant, he the defendant undertook that the mare was sound; that the plaintiff, confiding in the promise of the defendant, afterwards delivered to the defendant the said horse of the plaintiff, and also paid the defendant 25*l.* in exchange for his mare. *Breach*, that the defendant's mare was not sound, whereby she became of no use or value to the plaintiff; and that he had been put to great expense in keeping, feeding, and taking care of her. To these were added counts for horse-meat and stabling. The defendant pleaded the general issue.

At the trial, before Lord Chief Justice *Tindal*, at the last Assizes at *Bristol*, it appeared that the plaintiff had agreed to exchange his horse for the defendant's mare, and to pay him 25*l.* in money. That when the plaintiff's horse was sent, and the money paid by his servant, he took back the defendant's mare, and a written receipt for the money, which stated, "that both the horse and mare were warranted sound." The mare turning out to be unsound, the plaintiff, after keeping her a fortnight, returned her to the defendant, who refused to send back the plaintiff's horse, or return the money paid by him; upon which the present action was commenced.

On the production of the receipt by the plaintiff, and which was the only evidence he offered in proof of the warranty of the defendant's mare, it was objected for the defendant, that, as the declaration did not allege that the

In a declaration of *assumpsit* for the breach of a warranty of the soundness of the defendant's mare, the plaintiff in his declaration alleged, that, in consideration that he would deliver a horse of his to the defendant, and also pay him a certain sum in exchange for a mare of the defendant, he undertook that she was sound.—In order to prove the warranty of the defendant's mare, the plaintiff produced a receipt written by the defendant, and given on the payment of the money, in which it was stated that both the horse and mare were warranted sound:—*Held*, that the declaration could not be supported, as it did not set out the whole of the consideration, the plaintiff not having alleged that he had warranted his horse to be sound.

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plaintiff warranted his horse to be sound, there was a variance between the contract as laid and proved, and that the main consideration for the defendant's warranting his mare to be sound was, that the plaintiff's horse should be sound also.

For the plaintiff it was submitted, that, although the defendant stated in the receipt that both the horse and mare were warranted sound, it was not conclusive on the plaintiff, he not being present at the time it was given; and that, as the contract was rescinded by the return of the defendant's mare, when she was discovered to be unsound, the plaintiff was entitled to a verdict;—or that, at all events, he had a right to recover the amount of her keep and food. His Lordship, however, thought that the contract was improperly stated in the declaration, as there was no averment that the plaintiff had warranted his horse to be sound; and he accordingly directed a nonsuit.

Mr. Serjeant *Bompas* now applied for a rule *nisi*, that this nonsuit might be set aside and a new trial granted; and submitted that it was not necessary for the plaintiff to allege in the declaration, that he had warranted his horse to be sound;—although the defendant had so stated it in the receipt, it was not conclusive evidence against the plaintiff; and that, at all events, when the mare was sent back to the defendant as unsound, it was a dissolution of the contract. The consideration for the warranty by the defendant, that his mare was sound, was the delivery of the plaintiff's horse in exchange, together with the sum of 25*l.*, the receipt of which the defendant acknowledged, and the plaintiff had then fully performed the contract on his part. In *Miles v. Sheward* (a), it was held, that where the whole consideration for a promise is truly stated, and also all such parts of the promise itself the

(a) 8 East, 7.

breach of which is complained of, it is not necessary to state in the declaration other parts of the promise, not qualifying or varying in any respect the parts so complained of as broken. Here, the substantial part of the contract, for the breach of which the plaintiff complained, was, that the defendant's mare was not sound, and the declaration is framed accordingly; and in which the consideration is stated in substance, though not in the terms of the receipt. In *Wildman v. Glossop* (a), where the contract declared on was, that the plaintiff had bargained and sold, and the defendant agreed to buy, a large quantity of head matter and sperm oil, which was afterwards ascertained to be a given quantity, and the contract proved was for the purchase of all the head matter and sperm oil *per the Wildman*, it was held, that this was no variance; and the case of *Cotterill v. Cuff* (b), was there referred to, where the declaration stated, that, in consideration that the plaintiff had agreed to buy certain bacon, the defendant undertook that it was prime bacon, and the contract proved was prime *singed* bacon; on its being insisted that this was a variance, it being an essential ingredient of the contract that the bacon should be *singed*; yet the Court held it to be sufficient to state so much of the contract as related to the point of which the plaintiff complained. And here, the gist of the action was, the unsoundness of the defendant's mare, and there was no condition annexed to the warranty made by him, that the plaintiff's horse should be sound also. In *Silver v. Heseltine* (c), a declaration upon a contract for not delivering a quantity of gum senegal, was held to be supported by evidence of a contract for *rough* gum senegal; and Lord Chief Justice *Abbott* said—"The contract produced contains all that is set forth in the declaration." And Mr. Justice *Bayley* said—"You are not bound to

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(a) 1 Barn. & Ald. 9.

(b) 4 Taunt. 285.

(c) 1 Chit. Rep. 39.

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insert in the declaration, all that may be tacitly implied." Here, the contract is set out in substance, and when the receipt was produced, it was found to contain all that was set forth in the declaration. In *Parker v. Palmer* (a), the declaration stated, that the defendant bargained for, and bought of the plaintiffs, a quantity of *East India* rice, according to the conditions of sale of the *East India* Company, to be put up at the next Company's sale, by the proprietors, if required, at a certain price there mentioned; and it was proved, that, besides these conditions, the rice was sold *per sample*; and it was held to be no variance: and Lord Chief Justice *Abbott* said—"The words *per sample* are not a description of the commodity sold, but a mere collateral engagement on the part of the seller, that it shall be of a particular quality; the breach of that engagement may furnish a matter of defence to the defendant, but the plaintiff does not rely on it; and need not state it in his declaration." So, here, the warranty of the plaintiff's horse was a mere collateral engagement, the breach of which might give the defendant a cause of action against him; but it formed no part of the contract, for the breach of which the plaintiff complains, and he was, therefore, not bound to set it out in his declaration.

Secondly, whether the plaintiff had warranted his horse to be sound or not, was a question for the Jury. The receipt given by the defendant was not conclusive evidence of the contract. The plaintiff was not present at the time, nor did the defendant offer any evidence that the plaintiff warranted his horse to be sound; it therefore ought not to bind him; and when he discovered that the defendant's mare was unsound, he, very properly, returned her; and when he did so, the contract was dissolved; and as she was warranted sound at the time of the exchange, but turned out not to be so, she never became the property of the

(a) 4 Barn. & Ald. 387.

plaintiff, and he was consequently entitled to recover for her keep. The nonsuit therefore ought not to stand, and the plaintiff is entitled to a new trial.

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Lord Chief Justice TINDAL.—I think, that, under the circumstances of this case, the plaintiff was properly nonsuited. The action was founded on the warranty of a mare, which the defendant had given the plaintiff in exchange for a horse of his, and 25*l.* in money. But that was not the whole consideration for the defendant's warranting his mare to be sound; and it is a well known rule in pleading, that, in *assumpsit*, the plaintiff, in his declaration, must state the whole of the consideration truly, which induces the defendant to make the promise, for the breach of which the action is brought. The question then is, whether, in this case, the whole of the consideration appears on the face of the declaration? It has been insisted that it does, as the allegation was, in substance, according to the terms of the contract. The plaintiff, in order to prove that the defendant warranted his mare to be sound, offered the best evidence of it, namely, a written receipt given by the defendant, and that was the only evidence to charge him with a breach of warranty. The terms of the contract, as stated in the receipt, are larger than those in the declaration; for the receipt stated that the plaintiff's horse and the defendant's mare were both warranted to be sound. The warranty by the defendant, therefore, did not depend on the mere delivery of the plaintiff's horse, and the payment of 25*l.* in addition: nor did it depend on a mere exchange of horses, for, by the terms of the receipt, the horse and mare were both warranted to be sound, the whole of the contract, therefore, was not set out in the declaration, as it is only alleged, that, in consideration that the plaintiff would deliver a certain horse of his to the defendant, and would also pay him a certain sum in exchange for a certain mare

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of the defendant, he, the defendant, undertook that she was sound. But there was also a personal liability imposed on the plaintiff, and for which he might have been answerable in damages, if his horse should turn out to be unsound. There is a wide distinction between the cases which have been cited, and the present, as there the warranty only related to the misdescription of goods which were the subject matter of the action. If there be a contract of sale, and also a warranty of the article sold, and a party sues for the mere breach of contract, it is not necessary to declare on the warranty, as a purchase and sale raise a sufficient consideration between the buyer and seller. Here, however, the action is founded on a breach of warranty. But the warranty was not confined to the defendant's mare, but also to the plaintiff's horse, which was delivered to the defendant in exchange for his mare, and he had a right of action against the plaintiff, if his horse should turn out to be unsound. The plaintiff relied on the receipt given by the defendant, and which was the best evidence of the contract, it having been reduced into writing, but it was not declared on according to its terms. With respect to the plaintiff's being entitled to recover for the keep of the mare, he should have shewn that the contract between him and the defendant was rescinded or dissolved. That, however, must depend upon the act of both parties, and the mere return of the defendant's mare, by the plaintiff, left the contract still open; for, if the plaintiff's horse were not sound, the defendant would have a right of action against him, and the defendant refused to return either the plaintiff's horse, or the money which he paid in exchange for the mare. I therefore think, that the nonsuit was correct.

Mr. Justice PARK.—I am of the same opinion. It appears that there was a receipt in writing, on which the plaintiff relied at the trial, to shew that the defendant had warranted his mare to be sound. It was incumbent on

the plaintiff to state the *whole* of the consideration for such warranty in the declaration:—but which he did not do: for the defendant in his receipt stated that the horse given by the plaintiff, in exchange, should be *sound*, as well as the defendant's mare. I therefore think, that there is no foundation for this application.

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Mr. Justice BURROUGH concurred.

Mr. Justice GASELEE.—The terms of the receipt are conclusive evidence of the contract, and by which both the horse and mare were warranted to be sound. I also think, that the plaintiff cannot recover for the keep of the mare; for, in *Weston v. Downes* (a), where the defendant sold the plaintiff a pair of horses, which the defendant undertook to take back if the plaintiff should disapprove of them and return them within a month, which the plaintiff did, but took another pair from the defendant in their stead, without making any new agreement, and the latter horses he also returned within a month, and afterwards received a third pair without making any new agreement. He also disapproved of them, and offered to return the third pair, but the defendant would not take them back: it was held, that the plaintiff could not recover in an action for money had and received, as the payment was made on a special contract, which was still open, and not given up by the defendant, but continued between the parties through all their subsequent dealings.

Rule refused.

(a) 1 Doug. 23.

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Wednesday,
Nov. 11th.

An ancient document, signed by the rector of a parish for the time being, setting out the payment of tithes by a *modus*, is admissible in evidence in support of such *modus*, although such document was not produced from the registry of the bishop or archdeacon, but was found among the title deeds of a land-owner in the parish:—on the ground that, as it was evidence against the rector who signed it, it was admissible against his successors.

MADDISON, Clerk, *v.* NUTTALL.

THIS was an action of debt, and brought by the plaintiff, the rector of the parish of *West Monckton*, in the county of *Somerset*, against the defendant, a farmer, for not setting out the tithes of hay.

The defendant pleaded an ancient *modus*, or customary payment, whereof the memory of man runneth not to the contrary, of two pence *per* acre, for every acre of meadow land lying in a division of the parish, called the higher side of the parish; and one penny *per* acre, for every acre of meadow lying in the division of the lower side of the parish. The defendant then averred, that the land on which the plaintiff alleged that the tithes should have been set out, was meadow land of and belonging to the defendant, and that it was situate in the higher side of the parish. The plaintiff traversed the existence of the *modus* in his replication, on which issue was joined.

At the trial, before Lord Chief Justice *Tindal*, at the last Assizes at *Bridgewater*, the defendant, in support of the *modus*, offered in evidence the following document, which was found among the title deeds of an extensive land-owner in the parish:—

“ Notification of the tything of the parish of *West Monckton*.

“ A note of all such tenthes and tithes as have bene usuallye and accustomedlye paied within the parishe of *West Monckton*, and countie aforesaid, and manner of the payment thereof tyme out of minde, and noe other, nor otherwise than as followeth: *videlicet*,

“ *Imprimis*, at *Ester*, before takinge of the communion, the communicants ought to come to the churche, and there, with the parson, are to make their *Ester* boocke, and are to shew him what groundes they lett or sett-

“ *Item*, for a garden vsed to be paied, *id.*

" *Item*, for each communicant paied, *id.*

" *Item*, in the higher side of the saied parishe, payde for every titheable acre of meadow, *ijd.*"

A number of other items were then set out, several of which the plaintiff's counsel insisted were rank *moduses*. The document concluded as follows:—

" *Item*, the parson is to keepe a bull and a bore for the parishe, or must allowe them what they paye to other men for his defaulte in either kinde in that behalf.

" The abouesayde tenthes, tythes, and no other, and manner of paymente as abouesayde, and not otherwise, have been ever vsuallye payde, as it appeares by a certayne role, bearing, date the 22nd daye of *August*, in the yere of our Lord God, 1619, kept in the parishe chest, subscribed vnto by fower seuerale men, who were procters and gatherers of the tythes and tenthes as abouesayde, at seuerale tymes, for certaine yeres together, besides diuers other of the most able and sufficient men of the same parishe.

Philippus Fry, rect.

Ita est.

W. Kingelake,

Philip Mathew, als. procter,

The marke of ✕ *John Prince*,

William Rayer.

Humph. Quicke,

Henry H. Crosse,

Edm. Janc,

John Hare,

Thomas Stevens,

Thomas T. L. Upham."

The plaintiff put in evidence a terrier, signed by *Philip Fry*, and which was produced from the bishop's registry, and in which no mention was made of the *modus* for meadow, and it was objected that the document offered by the defendant ought not to be received, because it did not come from the proper custody, *viz.* the bishop's register office, or the registry of the archdeacon of the diocese.

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But, on the defendant's proving that *Philip Fry* was the rector of the parish from 1587 to 1642, and that the document in question was signed by him, and his signature was proved by comparing it with entries made by him in the parish books, and with his signature to various papers produced from the bishop's registry, the Lord Chief Justice allowed the document put in by the defendant to be received in evidence, not as a terrier, but as an admission made by the rector for the time being; and he therefore thought that it was evidence for the Jury, *valeat quantum*.

Contradictory evidence was given as to the boundary line between the higher and lower sides of the parish, as it had occasionally been varied by the removal of fences, and by new inclosures. But the defendant proved, that the close from which the plaintiff claimed to take tithes was within the higher division of the parish, and that it had once been ploughed by him, although it was admitted that it was shortly afterwards laid down to grass, and that it had so continued ever since. The Jury found a verdict for the defendant.

Mr. Serjeant *Merewether* now applied for a rule *nisi* that this verdict might be set aside and a new trial had. He submitted—*First*, that the document produced by the defendant, for the purpose of establishing the *modus*, was improperly admitted in evidence. It was, in purport, a terrier, which derives its authority from being deposited either in the bishop's register office, or the registry of the archdeacon of the diocese; and unless it be produced from one of these repositories it ought not to be received in evidence. The document in question was found in the muniment chest of an owner of lands in the parish, which must be deemed a suspicious place of custody, as it operated to discharge such owner from the payment of tithes for meadow hay. Besides, a terrier was produced from the bishop's registry, in which no mention was made of the *modus* for

titheable meadow, although the document on which the defendant relied appears to have been made during the incumbency of the same rector. It therefore ought not to have been received even as an admission made by him as to the mode of tithing at the time it was made. If it had come from the parish chest, the question might be different; but, in *Atkins v. Hatton* (a), in order to disprove a *modus*, the plaintiff (a clergyman) offered in evidence a paper purporting to be a terrier found in the charter chest of a college which had property in the parish, but it was rejected as evidence, as it did not come from a quarter that could give it authenticity; and even if it were a copy, the only proper repository would be the parish chest. *Secondly*, as the document produced by the defendant contained several rank *moduses*, it cannot be entitled to any credit. Besides, in order to support a *modus* as to the payment of tithes, the mode of payment must be certain and apparent upon the face of the instrument; and here, it appears that, in the higher side of the parish, the sum of 2*d.* was paid for every titheable acre of meadow. The defendant, therefore, ought to have shewn the boundaries of the higher and lower divisions of the parish, which he failed to do, as the boundary line had occasionally been varied by the removal of fences and other incidental circumstances; and it also appeared, by the parish rates, that certain closes had been rated at one time in the higher, and, at another, in the lower division; so that it was impossible for the rector to ascertain with certainty to which part of the parish the *modus* as to meadow applied; and there was no evidence to shew that a composition had ever been paid. *Lastly*, the *modus* being pleaded to have existed from time immemorial, and it appearing upon the face of the document that a certain sum was paid for every titheable acre of meadow, it could apply only to ancient meadow, and not to land which had been since cou-

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(a) 2 Anst. 387; S. C. 4 Gwill. 1406.

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verted into meadow. The defendant, so far from shewing that the close in which the tithes ought to have been set out was ancient meadow, admitted that he had ploughed it since it came into his occupation. But it was incumbent on him to shew not only that it was situate in the higher side of the parish, but that the boundary line between the higher and lower division had been ascertained and fixed, and that the land was ancient meadow land, and had so remained during the whole time he had been in the possession or occupation of the farm.

Lord Chief Justice TINDAL.—I think that the question in this case could not have been submitted to the Jury in any other mode than that in which it was left at the trial. But it was then objected, and which objection is now renewed, that a certain document produced by the defendant, to support a *modus*, was improperly admitted in evidence. Whether it were or were not is a matter of law, and the only question is, whether it ought to have been submitted to the consideration of the Jury. I thought it was evidence *valeat quantum* for them. It was an ancient instrument or document found in the possession of one of the parishioners, an extensive land-owner, and was headed, "Notification of the tything of the parish of *West Monckton*." It was proved to be signed by *Philip Fry*, who was the rector of that parish from 1587 to 1642. As, therefore, it was proved to have been signed by him, although it did not come out of the registry of the bishop, or other proper place of custody or repository, to make it receivable in evidence as a terrier, yet I thought it was evidence as against the rector who signed it, as it amounted to an admission under his own hand during his incumbency, and set out the *modus* or terms of payment of certain tithes which the defendant sought to establish. As, therefore, it would have been evidence as against the former rector during his incumbency, I thought it was admissible as against his successors. I

did not impute to it the same weight as if it had been a terrier produced from the registry of the bishop or the archdeacon of the diocese; nor did I so put it to the Jury; but I left it to them to consider and weigh the document in question against the terrier produced, on the part of the plaintiff, from the bishop's registry, and submitted both these instruments to their consideration. *Secondly*, it has been said, that there was not sufficient evidence with regard to the boundary of the divisions of the parish, and that, as the document produced shewed that there was a higher and lower side of the parish, there should be precise evidence as to those divisions, which could only be ascertained by the boundary line. Whether or not those divisions had been established or fixed, was a question expressly for the Jury. Evidence was adduced to shew that the division in which the defendant's close was situate, had, for a length of time, been designated as being within the higher side or division. Several of the parish rates were produced, in which the higher and lower divisions were expressly mentioned, and these were also submitted to the observation of the Jury. It further appeared, that the distinction as to the higher and lower divisions was still preserved; and I left it to the Jury to say, whether it was yet recognised; and that, as it appeared to have been adopted previously to the statute of the 43rd of *Elizabeth*, by which poor rates were first introduced, it might be considered an immemorial usage. It appeared, that of late years there had been inclosures made, and fences set up in the exact line of the old boundary, and that, in some instances, closes had been changed from the higher to the lower division; but that was no reason for destroying the *modus*. Still, however, the questions for the Jury were, whether they were satisfied that there was a higher division of the parish to which the *modus*, sought to be established by the defendant, applied; and whether such usage could be defeated by the mere alteration of fences; and it was proved beyond a doubt, that the close in question was on the higher side, or

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within the higher division of the parish. If, therefore, this cause were to go down again, I do not think that it could be left to the Jury in any other terms, as far as regards this question; and I am not prepared to say, that I am dissatisfied with their verdict. But, it has been insisted, that there was a want of proof by the defendant with respect to the meadow land, as he did not shew that it was ancient meadow; but there is an express allegation on the face of the plea, that the *modus* was payable for meadow land in the higher side of the parish from time immemorial; it must, therefore, be inferred, that such meadow was ancient meadow; and although it might have been shewn that it was ploughed or converted into arable on one or two occasions, yet it was a question for the Jury to say, whether the close in question was meadow or not when the plaintiff required the tithes to be set out. I therefore think that this verdict ought not to be disturbed.

Mr. Justice PARK.—The only point to which I think it is at all necessary to direct my attention, is the objection which has been raised as to the admissibility of the document offered in evidence by the defendant, in order to establish the *modus*. With respect to the other objections, the questions were most properly and fully left to the Jury by my Lord Chief Justice, and he now says, that he is not dissatisfied with their verdict. The first, however, is a legal objection, *namely*, as to whether the document produced by the defendant was properly received in evidence or not. It certainly was not a terrier, nor was it received as such. A terrier is returned to the registry of the bishop or the archdeacon, which is the proper repository, and from whence it ought to be produced; and if the document in question had been deposited there, it would not have been necessary to prove the signature of the then incumbent or rector. But, as a mere paper to which he had affixed his signature

as rector, it was sufficient to prove such signature, which was done, and the instrument appears to have been deposited in the parish chest in 1619, which was shortly after the passing of the 43rd of *Elizabeth*, and the *modus* on which the defendant relied is set out in terms. The rector, who signed the instrument, was an interested person during the time of his incumbency, and the receipt by him acknowledging that he had been paid 2*d.* for every titheable acre of meadow in the higher side of the parish, would be not only evidence against him, but against his successors also. I am, therefore, of opinion, that this instrument, signed by the then incumbent or rector, was properly received in evidence, and his signature need not have been proved, if it had been found in the bishop's registry or other proper repository; and, as the rector gave a receipt recognising the *modus*, it was evidence as against his successors. The document in question was, therefore, properly admitted, not as a terrier, but on the same principle as a receipt of certain sums on account of the *modus*.

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Mr. Justice BURROUGH.—My Lord Chief Justice has said that he is not dissatisfied with the verdict, and I have no doubt but that all the questions were fully left to the Jury; and the cause certainly required a great deal of attention and investigation. I am of opinion that the paper in question was receivable in evidence at the time it was offered, and that it was not rendered inadmissible by the terrier produced by the plaintiff from the bishop's registry, or by any subsequent evidence. It was clearly admissible as against the rector who signed it, and it was therefore receivable as against his successors, as an instrument signed by a preceding incumbent of the parish. Its being returned to the registry of the bishop would have had no effect, or given it greater weight, for that is only a proper repository for terriers or other instruments of a like nature; and, on this being proved to be a genuine paper or memorandum,

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and signed by a former rector, it was admissible in evidence, for the purpose of shewing the existence of a *modus* at the time it was made; and it was not offered as a terrier, but as an admission made by such rector.

With respect to the objection, whether the close in question was ancient meadow or not, it was a mere matter of fact for the Jury. The owner of land may, if he pleases, change it from pasture to arable, to deprive the parson of his tithe of hay; but, if he do so, when the character of the land is afterwards changed, and it becomes meadow again, the *modus* for hay attaches, although its operation might have been suspended for a time. So, with respect to the higher and lower divisions of the parish, it was a mere matter of fact for the Jury to determine as to the boundary between the two. The parish rates were produced, to shew that there was such a division, and evidence was given of it previously to the reign of *Elizabeth*, when poor rates were first raised, and which was proof of an immemorial usage.

Mr. Justice GASELER.—In actions of this description, there is a natural tendency in Juries to support a *modus* as against the rector or vicar, and which ought not to prevail. Here, however, the defendant offered evidence in support of the *modus*, by a document proved to have been signed by a former rector of the parish during his incumbency; and although a terrier in the bishop's registry was produced by the plaintiff, which was silent as to the *modus* in question, still my Lord Chief Justice has said that he is not dissatisfied with the verdict. The issue between the parties was not confined to the identity of a particular spot of land, but the question was, whether the *modus* in question applied to the higher side or division of the parish. It was proved by several documents, as well as by the parish rates, that there was such a division, and that the close in question was within it. Even the rates made mention of the higher and lower divisions of the parish. I am

therefore of opinion that there is no foundation to disturb the verdict, either in law or in fact, as all the questions were properly and fully left to the Jury by my Lord Chief Justice.

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Rule refused.

HAYLLAR v. ELLIS.

Wednesday,
Nov. 11th.

THIS was an action brought by the plaintiff to recover the sum of 20*l.*, the balance of 120*l.*, being the price of three cart geldings, and one mare, sold by the plaintiff to the defendant.

By an order of Lord Chief Justice *Tindal*, before whom the cause came on to be tried, at the Sittings after the last Term, all matters in difference between the parties were, by an order of his Lordship, referred to an arbitrator (a barrister), and, on the parties attending before him, it was contended for the defendant, that the plaintiff had warranted the horses and mare to be sound, but that they were not so, as one of them had an epidemic fever, of which it died, and that the disease was communicated to several other horses belonging to the defendant, who therefore claimed to recover from the plaintiff the value of the horse that died, and also certain expenses to which he had been put in curing his own horses, as well as damages for the loss he had sustained in consequence of such horses being unable to do any work during the time they were diseased. The defendant insisted, before the arbitrator, that these claims were matters in difference, within the terms of the order of reference, and on which the arbitrator had authority to decide. The arbitrator awarded of and concerning the matters in difference between the parties, that the plaintiff had no cause of action against the defendant, and that the plaintiff should pay the costs of the reference and of the award.

Where all matters in difference between the plaintiff and defendant were referred to an arbitrator, and the defendant made several claims against the plaintiff, which might be the subject of a cross action, and the arbitrator found that the plaintiff had no cause of action against the defendant:—*Held*, that the award was sufficient;—all matters in difference between the parties having been referred.

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On an affidavit of these facts, Mr. Serjeant *Taddy*, on the part of the plaintiff, now applied for a rule *nisi*, that this award might be set aside, as it was not sufficiently certain upon the face of it, as the arbitrator did not appear to have taken into his consideration, or decided upon, the claim which the defendant alleged he had on the plaintiff in respect of the unsoundness of one of his horses at the time of the warranty; and if the defendant were to bring a cross action against the plaintiff for a breach of warranty, the award could not be pleaded in bar, although all matters in difference between the parties were referred to the arbitrator, as he only stated that the plaintiff had no cause of action against the defendant.

By the Court.—As, by the terms of the order of reference, all matters in difference between the parties were referred to an arbitrator, we must assume that the submission embraced all matters in difference in the cause; and as the arbitrator has awarded of and concerning the said matters in difference, that the plaintiff had no cause of action against the defendant, his award is sufficiently comprehensive and certain. The plaintiff sought to recover the sum of 20*l.*, being the balance of 120*l.*, for certain horses sold by him to the defendant:—and as the arbitrator has decided that he had no cause of action against the defendant, and directed him to pay the costs of the reference, it must be inferred that the arbitrator took the claims of both parties into his consideration, and made his award accordingly.

Rule refused.

1829.

Thursday,
Nov. 12th.

TOMLIN v. LAWRENCE.

THIS was an action by the plaintiff, as indorsee, against the defendant, as acceptor of a bill of exchange for 17*l.* 18*s.*, drawn upon the defendant by one *Thomas Andrews*, payable to his, *Andrews's*, order, who indorsed it to the plaintiff, and which was dishonoured by the defendant when due.

At the trial, before Lord Chief Justice *Tindal*, at *Guildhall*, at the Sittings after the last Term, it appeared that the bill became due on the 20th *May*, and that it was taken up by the plaintiff on the 26th, at the request of *Andrews*. It also appeared that the defendant accepted the bill for a debt he owed *Andrews* and one *Matthews*, who were in partnership as coal merchants, and who had supplied coals to the defendant, to the amount of the bill. The Jury found a verdict for the plaintiff.

The defendant having accepted a bill of exchange drawn on him by one of two partners in his own name, for a debt due to both:—*Held*, that the defendant was liable in an action at the suit of an indorsee, as the defendant could not be sued for the debt due from him to the partners, until the bill of exchange was due and dishonoured.

Mr. Serjeant *Taddy* now applied for a rule *nisi*, that this verdict might be set aside and a nonsuit entered, on the ground that a debt due from the defendant to *Andrews* and his partner jointly, for coals sold and delivered by them to the defendant in the course of their trade, formed no consideration for the acceptance given to *Andrews* alone. If they sued the defendant for the coals supplied, the acceptance of the bill drawn by *Andrews* alone, would not constitute a valid defence to the action, and the plaintiff, as indorsee, must be considered as standing in the same situation as *Andrews*, the drawer, as far as regards the defendant as acceptor. If a man be indebted to two persons jointly, and promise to pay one only, an action cannot be supported on such promise by the one alone, the promise being made to both. In *Comyns's Digest* (a) it is laid down, that the consideration

(a) Tit. "Action upon the Case upon Assumpsit," (B. 1, 10, 11).

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upon which an *assumpsit* shall be founded, must be some act by which the defendant derives a benefit, or the plaintiff sustains detriment or prejudice; and here, no benefit could accrue to the defendant, by giving his acceptance to *Andrews* alone, in payment for the coals, as it would afford him no protection, nor could it be deemed satisfaction of the original debt in an action brought against him by *Andrews* and *Matthews* jointly.

Lord Chief Justice TINDAL.—The defendant was indebted to *Andrews* and *Matthews*, who were partners as coal merchants, for coals delivered by them to the defendant, and he accepted a bill of exchange drawn upon him by *Andrews*, in satisfaction of such debt. A payment to one of two partners is a payment to both; and it is clear, that one partner may release another:—so, one of several partners may bind the others by giving a receipt for a debt due to the firm. The bill in question was accepted by the defendant, which was drawn upon him by *Andrews*, and taken by him in payment for the coals delivered by him and his partner *Matthews*, and they could not sue the defendant for the amount of the coals until the bill in question had arrived at maturity and been dishonoured. They, therefore, gave time to the defendant for the payment of the coals, by taking his acceptance in lieu of money; and as they were entitled to recover against him as the acceptor of the bill, so is the plaintiff to whom it was indorsed by *Andrews*.

The rest of the Court concurring—

Rule refused.

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PERRING and Another, Assignees of WIDGER, a Bankrupt, *v.* TUCKER.

Thursday,
Nov. 12th.

THIS was an action of trover for the recovery of certain title deeds.

At the trial, before Lord Chief Justice *Tindal*, at *Guildhall*, at the Sittings after the last Term, the following, among other admissions by the defendant's attorney, were given in evidence, *viz.* "I, *R. T.*, the attorney for the above-named defendant, do hereby agree to admit, on the trial of this cause, as follows:—*First*, that a commission of bankrupt under the Great Seal of *Great Britain*, was duly issued against *Austin Widger*, bearing date the 21st *June*, 1823, under which he was *duly declared* bankrupt, and the plaintiffs were chosen assignees of his estate and effects; and that the assignment, and bargain and sale, and all the proceedings under the said commission, or any part thereof, may be read in evidence by the plaintiffs on the trial of this cause, without further proof than is contained in the present admission." The plaintiffs having put in the commission and assignment for the purpose of shewing that they had been appointed assignees, the defendant's counsel called on them to produce the proceedings under the commission, in order to shew that *Widger* had not committed an act of bankruptcy; but his Lordship being of opinion that the above admission by the defendant's attorney dispensed with the necessity of producing the proceedings, the Jury found a verdict for the plaintiffs.

In an action of trover by the assignees of a bankrupt, the defendant's attorney admitted that the party had been *duly declared* bankrupt:—*Held*, that the defendant was thereby precluded from objecting to any of the proceedings under the commission, unless he had given notice to dispute it.

Mr. Serjeant *Taddy* now applied for a rule *nisi* that this verdict might be set aside and a nonsuit entered, or that a new trial might be had. He submitted, that, by the terms of the admission, the defendant's attorney only meant that no difficulty should be raised as to the proof of

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the proceedings under the commission, but that the act of bankruptcy was not intended to be admitted. Although *Widger* might have been duly declared a bankrupt, there might not have been a sufficient act of bankruptcy to support the commission, and all the proceedings under it ought to have been put in; and the defendant had a right to raise an objection to any irregularity or informality in the proceedings. Although the defendant could not dispute the title of the assignees by virtue of the assignment to them, yet he had a right to shew that *Widger* had not committed an act of bankruptcy, and which could only be shewn by producing the depositions on which the alleged act of bankruptcy was founded.

Lord Chief Justice TINDAL.—The admissions given by the defendant's attorney at the trial must be construed according to the meaning and fair understanding of the parties, and by which he admitted that *Widger* was duly declared bankrupt; and as no notice was given to dispute any of the proceedings under the commission, I am of opinion that the admissions were conclusive upon the face of them.

Mr. Justice PARK.—As the defendant's attorney admitted that *Widger* was *duly* declared bankrupt, that word appears to me to include matter of law and of fact. If the admission had been that the party had become bankrupt in due form of law, the question might have been different.

Mr. Justice GASELEE and Mr. Justice BURROUGH concurring—

Rule refused.

HOULDEN v. FASSON.

A RULE was obtained by Mr. Serjeant *Wilde*, on a former day in this Term, calling on the plaintiff to shew cause why the writ of *capias ad respondendum*, issued against the defendant in this cause, should not be set aside, and the bail bond, which had been given by the defendant, delivered up to be cancelled; and why the plaintiff should not pay the defendant all the costs of the proceedings and of this application. The motion was founded on an affidavit, which stated, that the writ was returnable on a day certain, *viz.* on the 3rd day of *November* instant, instead of the morrow of *All Souls*, the first general return day of the Term.

Mr. Serjeant *Merewether* now shewed cause, and took a preliminary objection to the affidavit filed in support of the application, as it appeared to have been made by two deponents, and their names were not set out in the *jurat*, which was as follows:—"Sworn by both deponents at my house, &c. *James Burrough.*"

Mr. Serjeant *Wilde* submitted, that this was sufficient.

But the Court referred to the rule laid down by the Court of *King's Bench* (a), which requires, that upon every affidavit sworn in Court, or before any Judge or commissioner thereof, and made by two or more deponents, the names of the several persons making such affidavit shall be written in the *jurat*.

On the Secondary's stating that the same practice obtained in this Court, although there was no rule on the subject:—

The Court ordered the rule to be discharged generally; but said, that if a like omission occurred in future, the party must be subject to costs.

Rule discharged without costs.

(a) Mich. 37 Geo. 3. See 1 Tidd, 9th edit. 495.

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Saturday,
Nov. 14th.

If an affidavit be sworn by two or more deponents, their names must be written in the *jurat*.

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Saturday
Nov. 14th.

A new rule to plead is necessary to be given by the plaintiff on amendment of his declaration in the vacation succeeding the Term in which the declaration was delivered, although the plaintiff paid the costs of the amendment.

ADDIS v. THOMAS.

A RULE was obtained by Mr. Serjeant *Russell*, on a former day in this Term, calling on the plaintiff to shew cause why the interlocutory judgment which had been signed in this cause, and the subsequent proceedings thereon, should not be set aside for irregularity, with costs. The motion was founded on an affidavit, which stated, that the declaration was delivered on the 15th *June* last, and that a rule to plead within the first four days of the last *Trinity* Term was duly entered and plea demanded; that, on the 1st *July*, the defendant filed a general demurrer to the declaration; that, on the 27th, the plaintiff obtained a Judge's summons to amend the declaration; and that, on the attendance of the parties before him on the following day, the amendment was granted on payment of costs, which the plaintiff afterwards paid; and, on the 20th *August* following, the plaintiff signed interlocutory judgment for want of a plea, without having given a new rule to plead, which, it was submitted, he ought to have done, and, consequently, that the judgment was improperly signed.

Mr. Serjeant *Wilde* now shewed cause, and insisted, that a new rule to plead was not necessary, particularly as the plaintiff had paid the costs of the amendment; and he referred to *Sellon's Practice* (a), where it is laid down generally, that if a rule to plead be entered the same Term an amendment is made, though before such amendment, it is sufficient; and he cites 2 *Salk.* 517. In *Tidd's Practice*, it is said (b): "In the *King's Bench*, if the plaintiff amend his declaration in the same Term, the defendant shall have *two* days, exclusive of the day of amendment, to alter his first plea, or plead *de novo*; but if the amendment be made in a sub-

(a) Vol. I. 2nd edit. p. 302.

(b) Vol. I. 9th edit. 469.

sequent Term, the defendant is entitled to a new four-day rule to plead. In the *Common Pleas*, it seems, that a new four-day rule to plead is in all cases necessary to be given by the plaintiff, on amending his declaration;" and the case of *Blunt v. Morris* (a) is referred to, where the Prothonotaries and Secondaries, with the exception of one, reported, that, upon amending declarations, a new four-day rule to plead was necessary; and the other agreed, that the defendant was entitled to four days' time to plead, but thought the plaintiff need not give a new rule. And, in the *Anonymous* case referred to by Mr. Serjeant *Sellon*, in *Salkeld*, the Court held, that when the plaintiff amends and gives an imparlance, there must be a new rule to plead, otherwise not.

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But the Court referred to *Tidd's Practice* (b), where, it is said, "when the declaration is amended in the *King's Bench*, if a new rule to plead be entered the same Term the amendment is made, though before such amendment, it is sufficient, otherwise a new rule to plead must be entered. And, in the *Common Pleas*, we have seen (referring to page 469) the defendant is entitled, in all cases, on amending the declaration, to a new four-day rule to plead." Here, too, the summons to amend was taken out, and the declaration was amended in the vacation after the expiration of the last Term; and Mr. Secondary *Griffith* stated the practice to be, that when the declaration is amended, there must be a new rule to plead, whether the amendment be made in the same Term or in the following vacation, and that it is absolutely necessary in the latter case, as the defendant is entitled to an imparlance.

Rule absolute.

(a) 2 Sir Wm. Bla. 785.

(b) Vol. I. 475.

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Monday,
Nov. 16th.

PHILLIPS and Another v. TANNER.

Where the defendant died after the execution of a writ of *feri facias*, the Court would not allow it to be amended by inserting the *testatum* clause, as the interests of the personal representative might be affected by such insertion.

A RULE was obtained by Mr. Serjeant *Wilde* on the first day of this term, calling on the plaintiffs to shew cause why a writ of *feri facias*, which had been issued against the defendant in this cause, should not be set aside for irregularity, and that the money levied thereunder by the Sheriff should be paid to Mr. *John Gale*, administrator with the will of the defendant annexed, together with the costs of this application. The motion was founded on an affidavit, which stated that the writ of *venire* and trial were in *London*, and that the writ of *feri facias* was directed to the Sheriff of *Middlesex*, and executed by him in that county, and that the defendant died shortly after its execution.

Mr. Serjeant *Taddy*, on the same day, obtained a rule on the part of the plaintiffs, that the above writ of *feri facias* might be amended, by inserting the *testatum* clause, on an affidavit which stated that the action was brought against the defendant as the acceptor of a bill of exchange; that the cause was tried at *Guildhall*, at the Sittings after the last *Hilary* Term; that no defence was offered, and a verdict was entered for the plaintiffs; and that judgment was signed on the 14th *May* last, but that execution was not issued until the 24th *June* following. That the *venue* having been laid in *London*, and the defendant residing in *Middlesex*, a writ of *feri facias* was issued into *London* returnable on the morrow of the *Holy Trinity*, and likewise a writ of *feri facias* into the county of *Middlesex*, returnable in fifteen days of the *Holy Trinity*, on which the levy was made; but that, by a clerical error, the last-mentioned writ of *feri facias* was not made a *testatum* writ at the time. That, on the 4th instant, the following letter was sent by the plaintiffs' attorney to the defendant's attornies:

“ Gentlemen,—Herewith I send you notice of motion for leave to amend the writ of *feri facias* issued into *Middlesex*, and which I hope will supersede the necessity of the motion of which you have given notice.—The costs, if any, or so far as they are incurred, I will pay you.”

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 TANNER.

The learned Serjeant, in support of the amendment, relied on the case of *Meyer v. Ring* (a), where a *feri facias* was sued out into a different county from that in which the *venue* was laid, and the party suing it out afterwards took out a *feri facias* unto the proper county, and got a return of *nulla bona* in order to warrant the *feri facias* which first issued; the Court permitted the first writ to be amended by inserting the return of *nulla bona* and the *testatum* clause, although the second writ was returnable several days before the judgment was signed. It does not appear there, whether the amendment was granted on payment of costs, but here, as the plaintiffs' attorney offered to pay the costs incurred up to the time of the motion for setting aside the writ, the amendment ought to be allowed without costs.

Mr. Serjeant *Wilde* now shewed cause, and submitted, that this case was altogether distinguishable from that of *Meyer v. Ring*, as here the application to set aside the writ of *feri facias* was made by the administrator of the deceased defendant, and the Court will not allow process to be amended, when the rights of third parties have intervened, or may be affected thereby; for, in *Inman v. Huish* (b), a *testatum capias* having been made returnable on a day certain, instead of a general return day, was held to be irregular, and the Court refused to amend it, as it would affect the bail. That case was decided after that of *Reubel v. Preston* (c), where the Court of *King's Bench* quash-

(a) 1 Hen. Bl. 541. (b) 2 New Rep. 133. (c) 5 East, 291.

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ed a writ for irregularity, for an informal return, although the day of return was equally certain as in the common form:—and in the late case of *Johnson v. Dobell* (a), where the defendant, having been arrested on a *capias*, returnable on a day certain, instead of on a general return day, and given a bail-bond to the Sheriff:—the Court refused to allow the writ to be amended, unless the plaintiff would consent to discharge the bail on the defendant's entering a common appearance. But the case of *Hunt v. Pasman* (b) is precisely in point, where the Court refused to allow the plaintiff to amend a *feri facias*, when the defendant had become bankrupt before sale of the goods taken under it:—and, on the case of *Paris v. Wilkinson* (c) being there cited, to shew, that, as a bankruptcy had intervened, the Court would not permit the amendment, and that, by setting aside the writ, the property would vest, where it ought, in the assignees, Lord *Ellenborough* said: “In *Paris v. Wilkinson*, the Court would not give the plaintiff leave to amend, to the prejudice of the rights of third persons, and I am not aware of any case in which they have so done. We are very unwilling at all times to interfere with the rights of parties which have accrued by bankruptcy. In this case, not only the recital, but the mandatory part of the writ, must be amended. Had the application been made earlier, we might have been inclined to listen to it; but, without some authority to warrant it, I think it would be going too far in this stage of the case, to allow the amendment.” And Mr. Justice *Dampier* said—“The plaintiff's own mistake makes it necessary for him to come to the favour of the Court, which might have been extended to him, if the rights of third persons had not intervened.” So, here, as the defendant died after the issuing of the writ, and before the application to amend

(a) 1 Moore & Payne, 28.

(b) 4 Mau. & Selw. 329.

(c) 8 Term Rep. 153.

and the party applying to set it aside is the personal representative of the deceased, the Court will not allow the amendment, as it will have the effect of prejudicing his rights with regard to the estate of the deceased, against whom a defective writ was sued out and executed.

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Mr. Serjeant *Taddy* submitted, that an administrator with the will annexed must be taken to stand precisely in the same situation as the deceased himself, and that the property of the latter would not be changed or vest in third parties, as in the case of assignees of a bankrupt. Besides, the writ in this case had been executed, and the fruits of the levy paid over to the Sheriff, to which the plaintiff was clearly entitled, and his rights ought not to be prejudiced. The case of bail is altogether distinguishable, as they are entitled to be relieved when their principal is fixed, or surrenders himself in their discharge.

Lord Chief Justice TINDAL.—I am of opinion that this case falls within the exceptions to the ordinary cases where the Courts allow a writ to be amended by the introduction of a *testatum* clause. Such amendments have been allowed where the rights of third parties have not intervened, but the distinction taken by my brother *Wilde* seems to be founded on principle. Here, it appears that the defendant died after the writ of *feri facias* was executed and before the application was made to set it aside. We cannot know what steps the administrator may have since taken, he may have suffered judgment to be taken *de bonis testatoris*, for the benefit of some of the creditors of the deceased. The rights of the original parties were changed by the death of the defendant, against whom the writ was originally issued, and the rights of a third person intervened. I am, therefore, of opinion, that the rule for the amendment of the writ ought to be discharged; and that for setting it aside must be made absolute, on the admini-

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strator's undertaking to bring no action against the plaintiff or the Sheriff who has levied under the writ.

The rest of the Court concurring, the rule to amend the writ was discharged; and that for setting it aside was, on the above terms, made—

Absolute.

Monday,
 Nov. 16th.

HUGHES v. BRETT, Clerk.

An affidavit of debt made by the plaintiff, stated that the defendant was indebted to him in the sum of 225*l.* upon a bill of exchange, drawn by *M. J. D.* upon, and accepted by, the defendant, and indorsed by *J. M. D.* to the plaintiff, and due at a day then past:—
Held sufficient, although it did not state that the bill was payable to *J. M. D.*, or his order, because if the plaintiff had no interest in the bill, perjury might be assigned on the affidavit.

THE defendant was arrested and held to bail on the following affidavit of debt:—

“*Martin Hughes*,” (the plaintiff), “of &c., maketh oath and saith, that the Rev. *Joseph Brett*,” (the defendant), “is justly and truly indebted to this deponent in the sum of 225*l.* upon and by virtue of a bill of exchange, drawn by one *M. J. J. Donton*, upon, and accepted by the said *Joseph Brett*, (the defendant), and indorsed by the said *M. J. J. Donton* to the deponent, (the plaintiff), and due at a day now passed.”

Mr. Serjeant *Jones*, on a former day in this Term, obtained a rule *nisi*, that the bail-bond which had been given by the defendant on his arrest in this action, might be cancelled, and that he might be discharged on entering a common appearance, on the ground that the above affidavit was insufficient, as it did not disclose the character in which the plaintiff was entitled to sue, nor did it state that the bill was payable to the order of *Donton*, by whom it was indorsed to the plaintiff; and unless those words were introduced, he, *Donton*, could not negotiate the bill.

Mr. Serjeant *Wilde* now shewed cause, and submitted

that the affidavit was sufficient, as it stated—*First*, that the defendant was indebted to the plaintiff;—*Secondly*, the character in which he was indebted, namely, as the acceptor of a bill of exchange;—*Thirdly*, that the bill was drawn and unpaid;—and *Lastly*, that it was indorsed by *Donton*, the drawer, to the plaintiff, who therefore claimed to recover its amount in his character as indorsee. The learned Serjeant relied on the case of *Bradshaw v. Saddington* (a), where an affidavit, stating that the defendant was justly indebted to the plaintiff in a certain sum, upon and by virtue of a bill of exchange drawn by the defendant, and long since due and unpaid, was held to be sufficient, without stating in what character the bill was due to the plaintiff, *viz.* whether as payee or indorsee. The authority of that case was recognized and its principle acted upon by this Court in the late case of *Bennett v. Dawson* (b), where the same objection was raised as in this case, namely, that the affidavit did not state in what character the plaintiff claimed:—and Lord Chief Justice *Best* there said,—“That the true principle was laid down in *Bradshaw v. Saddington*, *viz.* that if the plaintiff had no interest in the bill on which he could sue the defendant, he would be guilty of perjury.” Here, the plaintiff has sworn that the bill was indorsed to him by *Donton* the drawer, and that it was due at a day then past:—and in *Bennett v. Dawson*, Mr. Justice *Park* said—“I have always understood an affidavit to hold to bail on a bill of exchange to be sufficient, although it do not state in what character the plaintiff sues; and the plaintiff has sworn that the defendant is indebted to him in the sum of 20*l.*, lent on a bill of exchange, accepted by the defendant, which is over-due and unpaid. That appears to me to be sufficient.” That case must govern the present, and there is consequently no ground for this application.

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(a) 7 *East*, 94.

(b) 1 *Moore & Payne*, 594; *S. C.* 4 *Bing.* 609.

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Mr. Serjeant *Jones*, in support of his rule.—The affidavit in this case is insufficient, both on authority and on principle, for it is not enough for the plaintiff to swear that the defendant is indebted to him, without shewing the character in which he sued, or at least that he had authority to sue. The bill was, in all probability, payable to *Donton*, or his order. In *Cathrow v. Hagger* (a), an affidavit, stating that the defendant was indebted to the plaintiff, for goods sold and delivered, without saying by the plaintiff to the defendant, was held to be insufficient: and this Court decided the same point in *Fenton v. Ellis* (b), and would not allow a supplemental affidavit to be made. The case of *Bradshaw v. Saddington* does not appear to have been determined upon mature consideration; and *Bennett v. Dawson* is altogether distinguishable from the present, as there enough was stated on the affidavit to shew that the defendant was indebted to the plaintiff; for it was alleged, that the former was indebted to the latter in the sum of 20*l.*, lent and advanced on a bill of exchange for 37*l.*, drawn by one *Stracey*, upon, and accepted by the defendant, and which was over-due and unpaid. There, it sufficiently appeared, that the sum of 20*l.* was advanced by the plaintiff on the bill, which loan of itself constituted a debt. So, in *Bradshaw v. Saddington*, the Court said, “that the affidavit sufficiently indicated the ground on which the plaintiff had holden the defendant to bail; that it was upon a bill of exchange drawn by the defendant, on which he was justly indebted to the plaintiff; and that it was not necessary for the plaintiff to specify in what particular character, whether as payee or indorsee, he claimed; for, if he had no interest in the bill on which he could sue the defendant, he would be guilty of perjury, and would be liable to an action for maliciously holding the defendant to bail.” But that is

(a) 8 East, 106.

(b) 6 Taunt. 192.

not the true principle, and a person ought not to be deprived of his liberty, unless the plaintiff shew expressly the character in which he sues, for a defendant might be indebted to a plaintiff, and yet the latter might not be entitled to hold him to bail, *vis.* as in the case of an equitable debt, or where he seeks to recover uncertain or unliquidated damages. The case of *Balbi v. Batley* (a) was decided in this Court nearly ten years after that of *Bradshaw v. Saddington*, where it was held, that an affidavit, stating that the defendant was indebted to the plaintiff on certain promissory notes of the defendant, without stating how the plaintiff became entitled to recover upon them, was defective; and, according to the report of that case in *Marshall*, Lord Chief Justice Gibbs said—"It is usual to state the connection between the plaintiff and the other parties to the note, in order to shew how the plaintiff became entitled, and that, in the case before the Court, the plaintiff might claim either as payee or indorsee." That case was not adverted to in *Bennett v. Dawson*, and here it does not appear that *Donton* had any authority to indorse the bill to the plaintiff, as it is not stated in the affidavit that the bill was payable to the drawer or his order.

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Lord Chief Justice TINDAL.—I am of opinion that this affidavit is sufficient. The plaintiff has deposed that the defendant is justly indebted to him in the sum of 225*l.*, upon and by virtue of a bill of exchange, drawn by one *Donton*, upon, and accepted by the defendant, and indorsed by *Donton* to the plaintiff, and which was due at a day then past. The only objection raised to this affidavit is, that it does not appear that the bill was drawn payable to the order of *Donton*, the drawer; but the defendant is charged as the acceptor, and is primarily liable to

(a) 6 Taunt. 25; S. C. 1 Marsh. 424.

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the holder, who is entitled to sue as such, although the bill were made payable to the drawer only, and not to him *or his order*; I therefore think, that enough appears upon the face of this affidavit, to shew that the plaintiff is entitled to sue the defendant; as it is stated, that the bill was indorsed by the drawer to the plaintiff; and if it were not, perjury might be assigned. But it appears to me, that this case must be governed by that of *Bennett v. Dawson*, in which this Court came to a right conclusion, and where Lord Chief Justice *Best* said—"The numerous cases on this point are of a most conflicting nature, and we must, therefore, have recourse to common sense. The true principle was laid down in *Bradshaw v. Saddington*, viz. that, if the plaintiff had no interest in the bill on which he could sue the defendant, he would be guilty of perjury." That principle ought not to be impugned by mere subtle distinctions. If the Court can see, on the face of an affidavit to hold to bail, that a sufficient debt exists, and is due from the defendant to the plaintiff, and that the defendant cannot be arrested a second time for the same cause of action, such an affidavit is sufficient, both in reason and on principle; and if perjury can be assigned to the party making it, it is all that the Court can require. Now, in this case, the plaintiff has sworn that the defendant is indebted to him as the acceptor of a bill of exchange, which was indorsed to him, (the plaintiff), by the drawer, and which is due and unpaid. Enough, therefore, appears on the face of this affidavit, to support an indictment for perjury against the plaintiff, if he has not a sufficient interest in the bill to entitle him to sue the defendant:—this case, therefore, must be governed by the principle laid down in *Bennett v. Dawson*, which appears to me to have been founded on a true foundation, and to which we ought to adhere.

Mr. Justice PARK.—It was truly said by Lord Chief Jus-

tice *Best*, in *Bennett v. Dawson*, that the numerous cases on this point were of a conflicting nature. They are still more so with respect to affidavits to hold to bail for goods sold and delivered, but I am not now inclined to recede from the opinion I expressed in *Bennett v. Dawson*. The cases on this point were there brought before the Court by my brother *Lawes*, and my brother *Wilde*, and we endeavoured to get at a sound principle. The case of *Machu v. Fraser* (a), was pressed upon us, and although what was there said by Lord Chief Justice *Gibbs*, viz. "That every word of the affidavit might be true, and yet that the plaintiff might not be entitled to arrest the defendant;" yet the affidavit only stated, that the defendant was indebted to the plaintiff on two bills of exchange, the one drawn by the defendant upon, and accepted by, one *John Thomas*, and the other drawn by the plaintiff upon, and accepted by, the defendant. There it did not appear in what character the plaintiff sued; and we thought, in *Bennett v. Dawson*, that the case of *Bradshaw v. Saddington* had established a true principle, namely, that if the party arresting had no interest in the bill, he was liable to be indicted for perjury; and here, as the plaintiff has sworn that the defendant is indebted to him in a certain sum, as the acceptor of a bill of exchange, drawn upon him by one *Donton*, and indorsed by the latter to the plaintiff, and which was due and unpaid, I think it is sufficient; and, it is most desirable that affidavits to hold a party to bail should be founded on an uniform and settled principle.

Mr. Justice BURROUGH.—I am clearly of opinion that this affidavit is sufficient, and if the whole of it had been read when the motion was made, I think we should have re-

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(a) 7 Taunt. 171; S. C. 2 Marsh. 483.

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fused the application; for it is expressly sworn, that the defendant was indebted to the plaintiff, as the acceptor of a bill of exchange, drawn upon the defendant by *Donton*, by whom it was indorsed to the plaintiff. He, therefore, sued in his character of indorsee; and he has also expressly sworn that the bill still remained due and unpaid.

Mr. Justice GASELEE.—If the affidavit to hold to bail had been read at the time the motion was made, I am not prepared to say that we ought not to have granted the rule, as I still entertain very considerable doubts whether the affidavit is sufficient; and, but for the late case of *Bennett v. Dawson*, I should be strongly inclined to think that it is not. The application for the defendant's discharge on filing common bail, was first made to me at chambers, and I then thought he was entitled to it, not only upon principle, but upon authority, by analogy to the case of goods sold and delivered, where an affidavit, merely stating that the defendant is indebted to the plaintiff for goods sold and delivered, without saying *by* the plaintiff *to* the defendant, has been held to be insufficient. It is conformable to common sense, that the goods must be delivered *by* the party claiming *to* the party sought to be charged; and I thought that that rule applied to the case of a bill of exchange, and therefore, that it was necessary for the plaintiff to shew in what character he was entitled to sue the defendant, as well as the character in which the latter was sued. But I am not prepared to say, that the case of *Bennett v. Dawson* is so precisely in point as to govern the present, as there the plaintiff stated that the defendant was indebted to him in a certain sum *lent* and advanced on a bill of exchange, drawn by one *Stracey* upon, and accepted by, the defendant, and then over-due and unpaid. It therefore appeared that the sum was lent and

advanced by the plaintiff on the bill; but, as we there decided on the principle established in *Bradshaw v. Saddington*, I think we ought not now to recede from it, and I should be extremely happy to see affidavits of debt so framed as to be unassailable by mere technical objections, or nice and subtle distinctions. If there be several intermediate indorsements between the drawer or original indorser and the ultimate indorsee or holder, it cannot be necessary to set them all out, or trace them down regularly on the face of the affidavit, although it may be prudent to do so in the declaration; and I have never seen an affidavit so framed. But here, as it is stated that the defendant is indebted to the plaintiff as the acceptor of a bill drawn upon him by *Donton*, by whom it was indorsed to the plaintiff, and that it was due at a day then past, it appears to me to be sufficient, without stating that the bill was payable to *Donton*, or *his order*.

Rule discharged.

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HARGRAVE v. SMEE, the Elder.

Tuesday,
Nov. 17th.

THIS was an action of *assumpsit*. The declaration contained two special counts upon the guarantie hereinafter mentioned. Counts for goods bargained and sold to the defendant, and delivered to *John* and *Edward Augustus Smee*; and a count upon an account stated between the plaintiff and the defendant. The defendant pleaded the general issue.

The cause was tried before Lord Chief Justice *Tindal*, at the adjourned Sittings in *London*, after the last *Trinity* Term, when a verdict was found for the plaintiff for 200*l*.

The defendant gave the plaintiff the following guarantie, in writing:—"I do hereby agree to guaranty the payment of goods, to be delivered in umbrellas and parasols to *J. and E. S.*, according to the custom of their trading with you, in the sum of 200*l*."

The custom of trading between the plaintiff and *J. and E. S.* was, to make up monthly accounts of goods delivered, and for *J. and E. S.* to give acceptances for the amount of each monthly account:—*Held*, to be a continuing guarantie.

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subject to the opinion of the Court upon the following case.

On the 5th *June*, 1828, the defendant signed the following guarantie:—

“No. 10, *Tunbridge Place, Bridge Road, Lambeth*,
 5th *June*, 1828.

“Mr. *John Hargrave*,

“Sir—I do hereby agree to guaranty the payment of goods, to be delivered in umbrellas and parasols to *John* and *Edward Augustus Sme*, of No. 38, *Milk Street, Cheapside, London*, according to the custom of their trading with you, in the sum of two hundred pounds. I am, Sir, your most humble servant—

J. Sme.”

The custom of trading between the plaintiff and Messrs. *John* and *Edward Augustus Sme*, who were sons of the defendant, *was*, to make up monthly accounts of the goods delivered between the 20th day of each month, and the 20th day of the next succeeding month, and, upon such making up, and adjusting the amount, acceptances of the said Messrs. *John* and *Edward Augustus Sme*, were given for the amount of each monthly account, payable at three months' date.

The plaintiff had sold and delivered to *John* and *Edward Augustus Sme*, since the 5th *June*, 1828, and previously to the commencement of this action, umbrellas and parasols, according to the custom of their trading with the plaintiff, amounting altogether to the sum of 520*l.* 8*s.* 2*d.*

The said *John* and *Edward Augustus Sme*, had, since the sale and delivery of the said umbrellas and parasols to them, paid the plaintiff various sums of money on account of the said umbrellas and parasols, so sold and de-

livered, amounting, altogether, to 276*l.* 1*s.* 5*d.* (that is to say)—

	£	s.	d.
For the amount of umbrellas and parasols, sold and delivered on and from the 5th <i>June</i> , 1828, to the 20th of the same month -	31	18	3
Do. From the 20th <i>June</i> , to 20th <i>July</i> following - - - - -	24	10	11
Do. From the 20th <i>July</i> , to 20th <i>August</i> following - - - - -	59	12	3
Do. On account of umbrellas and parasols sold and delivered from 20th <i>August</i> , to 20th <i>September</i> . - - - - -	160	0	0
	<hr/>	<hr/>	<hr/>
	276	1	5

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There now remains due from the said *John* and *Edward Augustus Sme* to the plaintiff, on the balance of the said account for umbrellas and parasols so sold and delivered since the 17th *September*, 1828, the sum of 200*l.* and upwards. The credit and time for the payment of the price of the said goods, according to the said custom of trading between the plaintiff and the said *John* and *Edward Augustus Sme* had elapsed, at and before the time of the commencement of this action, and the said *John* and *Edward Augustus Sme* had, before the commencement of this suit, been applied to by the plaintiff, for the balance so remaining due to the plaintiff, and had not paid the same, whereof the defendant had notice before this action was brought, and was requested by the plaintiff to pay him the said sum of 200*l.* upon his said guarantie.

The question for the opinion of the Court was, whether the said guarantie was a continuing guarantie or not, and if the Court should be of opinion that it was a continuing guarantie, the verdict was to be entered for the plaintiff,

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as aforesaid; but if the Court should be of a contrary opinion, then a nonsuit was to be entered.

The case now came on for argument—

Mr. Serjeant *Wilde*, for the plaintiff.—The only question is, whether the guarantie given by the defendant is a continuing guarantie? That will depend upon the intention of the parties, to be collected from the instrument itself, which, on the face of it, imports that it was meant to be a continuing guarantie. The defendant agreed to guaranty the payment of goods of a certain description to be delivered to his two sons, according to the custom of their trading with the plaintiff, in the sum of 200*l*. Now, goods to be delivered according to the custom of their trading, must mean, goods to be delivered from time to time, and is not to be confined to one transaction, or the delivery of the first parcel to the amount of 200*l*. If the Court feel any doubt as to the construction of the guarantie, it must be taken most strongly against the party giving it; and, as the agreement was drawn up between parties in trade, it must be construed liberally; and, as it is found as a fact in the case, that the custom of trading between the plaintiff and the defendant's sons *was*, to make up monthly accounts, and for the latter to give their acceptances for the amount of each monthly account, it not only shews the previous mode of dealing, but that the parties contemplated that it should be continued on the same terms; and if the sum of 200*l*. had not been inserted in the guarantie, the defendant would have been liable to the plaintiff to an unlimited amount, for goods supplied by him according to the previous course of dealing between him and the defendant's sons. In *Mason v. Pritchard* (a), the defendant gave a guarantie to the plaintiff, for any goods

(a) 12 East, 227.

he hath or may supply my (the defendant's) brother, *W. P.* with, to the amount of 100*l.*; and it was held to be a continuing or standing guarantie to the extent of 100*l.*, which might at any time become due for goods supplied until the credit was recalled; and the Court said, that "the words of the guarantie were to be taken as strongly against the party giving it, as the sense of them would admit of." The guarantie in that case is nearly similar in terms to the present, and the principle there laid down is clearly applicable; particularly as here reference was made to the previous mode of dealing or trading between the parties. In *Merle v. Wells* (a), the defendant, in a letter addressed to the plaintiffs, said—"I consider myself bound to you for any debt my brother may contract for his business as a jeweller, not exceeding 100*l.*, after this date; and Lord *Ellenborough* said—"I think the defendant was answerable for any debt not exceeding 100*l.*, which the defendant's brother might from time to time contract with the plaintiffs in the way of his business. The guarantie is not confined to one instance, but applies to debts successively renewed. If a party means to be surety only for a single dealing, he should take care to say so. By such an instrument as this, a continuing suretyship is created to the specified amount." It is true, that in *Melville v. Hayden* (b), where the defendant engaged to guaranty the payment of *A. M.* to the extent of 60*l.*, at quarterly account, bill two months, for goods to be purchased by him of *William* and *David Melville* (the plaintiffs); the Court held, that it was not a continuing guarantie:—yet there, the guarantie was merely for goods *to be purchased*, and there was no mention of any custom of trading, or previous course of dealing between the parties; and Mr. Justice *Bayley* said—"A party who takes a guarantie of this sort, should carefully provide that there are words in it expressive of its being a guarantie for goods to be

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(a) 2 Camp. 413.

(b) 3 Barn. & Ald. 593.

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furnished from time to time." Although, in *Evans v. Whyte*, Lord Chief Justice *Best* said (a)—"A guarantie, as against a surety, must receive a strict construction, and ought to be so framed as to embrace, in letter and in spirit; the nature of the dealing or transaction intended to be guaranteed, so as to make the surety answerable for the default of the original debtor," yet that is contrary to all the previous decisions, as the Courts have invariably said, that commercial instruments, drawn up by persons in trade, must receive a liberal and large construction.

Mr. Serjeant *Spankie, contra.*—The principle applicable to cases of this description, was laid down by Lord Chief Justice *De Grey* in *Wright v. Russell* (b), viz. that a surety shall not be bound beyond the scope of his engagement, as understood at the time he entered into it." and in *Pearsall v. Summersett*, Sir *James Mansfield* said:—"A guarantie is not to be held liable beyond the express terms of his contract: and in the case of the *Warden of Saint Saviour's Southwark v. Bostock*, which was an action against the sureties on an indemnity bond, that learned Judge said (c)—"I cannot distinguish this case from those in which it has been decided, that a surety is not to be charged beyond the express words of the bond into which he has entered." Here, the guarantie is not a continuing guarantie upon the face of it; so far from it, it would be satisfied by the delivery of, and payment for, one parcel of goods to the extent of 200*l.* The words, "according to the custom of their trading," do not necessarily denote that there had been any pre-existing course of dealing between the parties. They might equally be applied to a trading in future. Although it is found as a fact in the case, that the custom *was* to make up monthly accounts, yet the words in the guarantie are ambiguous, and may be taken to ap-

(a) 3 Moore & Payne, 136.

(b) 2 Sir W. Bl. 935.

(c) 4 Taunt. 600.

(d) 2 New. Rep. 179.

ply to goods to be delivered to the amount of 200*l.*, and if goods to that amount were delivered at any one time, and paid for by the defendant's sons, the guarantie would be satisfied. The case of *Melville v. Hayden* cannot be distinguished from the present, where the defendant engaged to guaranty the payment of Mr. *Moulden* to the extent of 60*l.* at quarterly account, bill two months, for goods to be purchased by him of the plaintiffs; and, it was held not to be a continuing guarantie, and that it was applicable only to the first quarterly payment after it was given, and did not extend to such goods as might be purchased by the party guaranteed from time to time of the plaintiffs. Here, therefore, it does not follow, that even if there had been a previous dealing, the guarantie would be a continuing or standing engagement. In *Mason v. Pritchard*, the words were, "for *any* goods he hath or may supply," so that the guarantie was applicable to any goods furnished at any time, whatever intervening payments might have been made. So, in *Merle v. Wills*, the defendant bound himself for *any* debt his brother might contract. In *Sansom v. Bell* (a), the condition of an indemnity bond was, that, if the principal should pay the plaintiffs all such sums as he should thereafter owe, on account of their being under acceptances for him, or on any other account *thereafter* to subsist between them, which Lord *Ellenborough* held to extend the guarantie without any limitation of time, or restriction as to the nature of the transaction. In *Bastow v. Bennett* (b), the defendant undertook to be answerable to the extent of 300*l.*, for *any* goods supplied by the plaintiff to *F.* and *B.*, provided they should neglect to pay him in due time; and Lord *Ellenborough* said—"Without the word *any*, it might perhaps have been confined to one dealing to the amount of 300*l.*" The introduction of the word

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(a) 2 Camp. 39.

(b) 3 Camp. 220.

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"*any*," therefore, has been held to enlarge the operation of a guarantie, and extend it to goods delivered from time to time. Here, however, the word *goods* is only introduced, and the guarantie might have been satisfied by the delivery and payment for one parcel to the amount of 200*l*. In *Kirby v. The Duke of Marlborough* (a), a bond entered into by *A.* and *B.* to the plaintiffs, to enable *A.* to carry on his trade, was conditioned for the payment to the plaintiff of all such sum or sums of money, not exceeding 3000*l*., which should, or might, *at any time or times thereafter*, be advanced and lent by the plaintiffs to *A.*, or paid to his use by his order and direction; and it was held not to be a continuing guarantie to the extent of 3000*l*., for advances made at any time, but only a guarantie for advances once made to the extent of 3000*l*.; and Lord *Ellenborough* said—"This is a bond given by the surety as an indemnity for advances to a definite amount; and, when an advance was made to that amount, the guarantie became *functus officio*, and was not a continuing guarantie." The words used in that case are far stronger than in the present, as they extended to *sums* to be advanced at any time or times thereafter; whilst here, the defendant only undertook to be answerable for goods to be delivered to the extent of 200*l*. The guarantie, therefore, might be satisfied by one delivery of goods and payment to that amount. The defendant, as surety, can only be bound by express words; and those of "according to the custom of their trading," are equivocal and ambiguous, and may refer to a future course of dealing; and, as was said by Mr. Justice *Best*, in *Melville v. Hayden*,—"It ought to appear unequivocally that it was the intention of the defendant to guaranty *Moulden's* payments for goods to be furnished from time to time;" and all

(a) 2 Mau. & Selw. 18.

the Court there held that it was not a continuing guarantie.

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Mr. Serjeant *Wilde*, in reply.—The general rule applicable to all cases of this nature is, that the intention of the parties must prevail, and which intent is to be collected from the terms of the instrument at the time it was given. Here, it must be inferred by the words, “according to the custom of their trading,” that they were meant to have reference to an antecedent course of dealing, by which the future trading between the parties was to be controlled, and a continuance of such dealings was contemplated. In *Kirby v. The Duke of Marlborough*, the condition of the bond recited, that the party for whose benefit it was given had occasion for divers sums of money not exceeding in the whole 3000*l.*, to enable him to carry on his trade, to which extent alone the surety was to be liable; for, as Lord *Ellenborough* observed, it is the same as if the surety had expressed that the bankers might lend to the amount of 3000*l.*; and, when an advance was made to that amount, the guarantie became *functus officio*. Here, however, the guarantie refers to a custom of trading between the parties, and it is found as a fact in the case, that *such custom was*, to make up monthly accounts, and for the defendant’s sons to give their acceptances for the amount of each monthly account. The plaintiff, therefore, is entitled to have a verdict entered for him.

Lord Chief Justice TINDAL.—The only question in this case is, what is the fair import to be collected from the language of the guarantie upon which the action is founded? It must be recollected, that it contains the words of the party sought to be charged, and who is the defendant in the suit. I think there is no sound reason to lay down a different rule with regard to the construction of a guarantie, than that which the Courts put upon any other

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written instrument. Now, with respect to a written instrument, the general rule is, that if the party who gives it, leaves it in ambiguous and uncertain terms by the expressions which he has used or adopted, the consequence must fall upon himself. Looking, then, at the terms of this guarantie, and the consideration for which it was given, it appears that two persons were previously in the course of dealing or trading with the plaintiff, who supplied them with a particular commodity, and that the defendant agreed to guaranty the payment of goods of a certain description, to be delivered to those two persons according to the custom of their trading with the plaintiff, to the extent of 200*l*. Now, I cannot but infer, that the custom of trading must have reference to a preceding course of dealing between those two persons and the plaintiff, and that inference is fortified by the statement in the case immediately following the guarantie, that the custom of trading between the parties *was to make up monthly accounts of* goods delivered between the 20th day of each month *and* the 20th day of the next succeeding month. This, therefore, shews the nature of the custom of the trading or course of dealing which had been previously carried on *between* the plaintiff and the parties on whose behalf the guarantie was given; and the evident intention was, that such course of dealing should continue. The object, as well as the words of the guarantie, appear to me to have reference to something continuing or prospective; and if they were to be restrained, or receive the limited construction which has been contended for, the parties for whom the defendant became responsible would not have the benefit intended to be conferred upon them; for, if goods to the amount of 200*l*. were delivered at any one time previously to the expiration of the first month, if it were not taken to be a continuing guarantie, the liability of the defendant would cease altogether; and the parties for whose benefit the guarantie was intended would not derive the

advantage which was anticipated from the defendant's remaining liable to the plaintiff for 200*l.* for goods to be delivered to them by the plaintiff, according to the custom of their trading with him. So, if 200*l.* worth of goods had been delivered to them by the plaintiff at any one time, if it were not a continuing guarantie, the defendant's liability would have been at an end on the twentieth day of the month next succeeding such day of delivery. There is no course of dealing stated on the face of the case to which the delivery of goods can be taken to be referable to the first delivery only: and, in order to give full effect to the whole of the guarantie, it must be taken to extend to the delivery of all goods of a particular description, according to the course of trade between the party supplying and the parties guarantied; and the defendant must be deemed liable for such goods to the amount of 200*l.*, on the account going on from month to month; and it appears that articles to more than the amount of 200*l.* have been supplied by the plaintiff, and that more than that sum now remains due to him from the parties for whom the defendant undertook to be responsible. I am, therefore, of opinion that the plaintiff is entitled to recover. It is difficult to reconcile all the cases on this subject, but in principle they approximate very closely to each other. That of *Melville v. Heyden*, which has been so much relied on for the defendant, appears to me to be distinguishable; as here, the predominant intention of the parties was, that the credit of the two persons guarantied should be kept up with the plaintiff according to the former established course of dealing or custom of trading with him; and, as the words of a guarantie must be taken most strongly against the party making it, I am of opinion that the plaintiff is entitled to judgment.

Mr. Justice PARK.—It has been conceded in the argument. VOL. III.

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ment at the bar, that every case of this description must depend upon its own peculiar circumstances, and that, in the construction of a guarantie, the Court must be governed by the apparent intention of the parties at the time it was given. A decision in one case, therefore, cannot assist us in another, except for the purpose of adverting to a principle which may be incidentally laid down; and the general, if not the only question is, whether an instrument of this description should receive a strict construction? I have always understood the rule to be, that a guarantie must be taken most strongly against the party who gives it; and the opinion of one Judge ought not to prevail against those of others; I, therefore, cannot agree with the words reported to have fallen from the late Lord Chief Justice *Best*, in the case of *Evans v. Whyle, vis.* that "guaranties ought to receive a strict construction, and that they should be so drawn up as to embrace in terms the dealing intended to be guarantied." That is directly contrary to what fell from the Court in the case of *Mason v. Pritchard (a)*; there, the defendant engaged to guaranty the plaintiff for any goods he *hath* or *may* supply the defendant's brother with, to the amount of 100*l.*; and Mr. Baron *Wood*, who tried the cause, held it to be a continuing contract to guaranty, to the extent of 100*l.*, goods which might, at any time, be furnished to the defendant's brother till notice to put an end to it; and the Court afterwards adopted the opinion of that learned Judge, and said, that "the words were to be taken as strongly against the party giving the guarantie as the sense of them would admit of;" and I think that that is the true principle, and that it ought to be supported. In this case, it appears to me, that my Lord Chief Justice has laid down the rule correctly, and put a true construction on the guarantie as to the meaning of the parties, with

(a) 12 East, 227.

respect to the delivery of goods according to the custom of their trading, and which was this, that the dealings between them should be continued on the same terms as they were before the guarantie was given:—and if the liability of the defendant for the sum of 200*l.* was only to apply to one parcel of goods delivered at one and the same time, the guarantie might have been put an end to at once; but it appears to me to have been the evident intention of the parties that the guarantie should be a continuing guarantie, and apply to goods to be delivered from time to time. This, too, seems to be manifest from the relative situations of the parties. The defendant undertook to guaranty the payment of goods of a particular description, to be delivered by the plaintiff to his, the defendant's, two sons, according to the custom of their trading with the plaintiff, to the extent of 200*l.* The defendant, therefore, did not mean to confine himself to the first two hundred pounds' worth of goods supplied; but the intention of the parties was, that it should be a subsisting or continuing guarantie to the extent of 200*l.* for goods which might, at any time, be furnished by the plaintiff to the defendant's sons, until he should give the plaintiff notice to determine or put an end to it, or to recal the credit, which, by the guarantie, the plaintiff was induced to give to the defendant's sons.

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Mr. Justice BURROUGH.—I hope the period is not far distant when we shall be able to decide a question of this nature upon principle, without being shackled by previous decisions; but the general rule to be collected from all the cases on this subject is, that a guarantie must be construed according to the intention of the parties, and most strongly against the person making it. Here, the parties did not mean that the credit to be given by the plaintiff to the defendant's sons should be limited to the

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amount of 200*l.* on the delivery of one parcel of goods, but that it should be a continuing guarantie for the payment of goods delivered according to the custom of their trading with the plaintiff; and it is found as a fact in the case, that the custom, at the time of the guarantie, was to make up monthly accounts of the goods delivered between the 20th day of each month, and the 20th day of the next succeeding month. It therefore appears to me to be clear that the guarantie was not meant to be confined to the first or single item of the account, but was to continue from month to month; and that, if goods were delivered to the amount of 200*l.*, according to the course of dealing between the parties, the defendant was to be still liable, that is, that he should be responsible to the plaintiff for goods furnished to the defendant's sons to the amount of 200*l.*, so long as he should continue to supply them according to the custom of the previous trading or course of dealing between them. Although commercial instruments of this nature ought, on principle, to receive a liberal construction; yet, the intent of the parties is the principal thing to be looked at, and which may be here collected by the Court from the terms of the guarantie, and the custom of trading as stated in the case.

Mr. Justice GASELEE.—I own I feel considerable doubts on this point, and have great difficulty in coinciding with the opinion which the Court has expressed. Although I think that the guarantie was not meant to be confined to one delivery of goods, but that the defendant should be responsible to the plaintiff to the amount of 200*l.* for goods delivered in various quantities and at divers times; yet the great difficulty I feel is, to distinguish this case from that of *Melville v. Hayden*, where the defendant engaged to guaranty the payment of *A. M.* to the extent of 60*l.*, at quarterly account, bill two months, for goods to

be purchased by him of the plaintiffs, and the Court held that this was not a continuing guarantie. So, here, the custom of trading between the plaintiff and the defendant's sons, was to make up monthly accounts of the goods delivered; and, on making up and adjusting the accounts, acceptances of the sons were given for the amount of each monthly account, payable at three months' date. The three first items of the account for goods delivered after the guarantie was given, is stated to be for the *amount* of goods sold from the 20th day of one month to the 20th day of the succeeding month; and, by the last item, it appears that certain goods were sold and delivered three months after the guarantie was given. Although, however, I entertain considerable doubts on the question, as I cannot well distinguish this case from that of *Melville v. Hayden*, yet I do not feel so strong an opinion as to induce me to dissent entirely from those expressed by the Court.

Judgment for the plaintiff.

CHARRINGTON v. LAING.

Tuesday,
Nov. 17th.

BY a *cognovit*, entered into and signed by the defendant, and dated on the 15th *December*, 1828, after reciting that the action in respect of which it was given, was brought by the plaintiff against the defendant, in *Easter Term*, 1828, to recover damages for the breaking up and obstructing of a certain road-way or right of passage to which the plaintiff claimed to be entitled, of the width of

In an action on the case, to recover damages for breaking up a highway, the defendant gave the plaintiff a *cognovit* to confess a judgment for 200*l.*, with a defeasance; that no execution should issue, if

the defendant, within a limited period, should reinstate the road according to certain stipulations contained in a plan, and to the satisfaction of a surveyor. The road not being completely reinstated within the time prescribed, the plaintiff sued out execution, and levied the 200*l.*, and costs: —*Held*, that the sum of 200*l.* was in the nature of a penalty, and not of liquidated damages; and the Court referred it to the Prothonotary to ascertain what damages the plaintiff had actually sustained, and what sum he was entitled to recover from the defendant by his neglecting to reinstate the road.

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thirty feet, and situate, &c.:—and that, to the putting an end to all controversy between the parties, it had been agreed upon between them, that, instead of reinstating the said road-way or passage in its original width of thirty feet, the defendant should reinstate and make good the same of the width of twenty-four feet only.

In order to carry the said arrangement or agreement into effect, the defendant did consent to withdraw the plea pleaded by him in the action, and did thereby confess the action, and that the plaintiff had sustained damage to the amount of 200*l.* besides his costs, charges, and expenses incurred in relation to the injury complained of, as well before as since the action brought, and which costs, charges, and expenses were to be forthwith paid by the defendant.

But it was, nevertheless, thereby expressly declared and agreed between the said parties, that if the defendant did forthwith pay to the plaintiff his costs, charges, and expenses as aforesaid, and should and did within the space of four calendar months from the date of the *cognovit*, reinstate and for ever leave open and unobstructed the said road-way or passage thereinbefore mentioned, of the width of twenty-four feet, the said road to be made good by the defendant, and to be completed within the said space of four calendar months from the date of the *cognovit*, and to the satisfaction of Mr. *George Smith*, surveyor, agreeably to a plan agreed upon and signed by the parties, and by which various stipulations and regulations were to be complied with by the defendant, and by which it was stipulated, (among other things), that the defendant should take down and rebuild a wall, and lay open and reinstate as a road so much of a lawn or shrubbery which the defendant had planted, as should suffice to restore the road-way to the stipulated width of twenty-four feet throughout: and it was thereby agreed, that the defendant, from time to time, and at all times, duly and properly fulfilling all and every the articles, agree-

ments, and stipulations aforesaid, no judgment should be entered up, nor execution thereon issued, for the damages, costs, charges, and expenses as aforesaid, or any part thereof:—But, in case default should at any time be made in performance of any one or more of the said several articles and stipulations thereinbefore contained, on the part of the defendant, the plaintiff was to be at full liberty forthwith to enter up judgment for the said damages, costs, charges, and expenses, and to issue thereon one or more writ or writs of execution on the said judgment for the said damages, costs, charges and expenses, or so much thereof as might then remain unpaid, together with the costs and charges of the judgment and execution, sheriff's poundage, officer's fees, and all other expenses incidental thereto. The defendant also undertook not to bring any writ of error, or do any other matter or thing to prevent the plaintiff from signing judgment and suing out execution thereon.

The road not having been reinstated to the satisfaction of *Smith*, the surveyor, within the time specified in the *cognovit*, viz. on the 15th *April*, 1829, the plaintiff caused judgment to be entered up, and, on the 2nd of *May* following, sued out a writ of *feri facias*, directing the Sheriff to levy 20*l.* 7*s.* 6*d.*, besides poundage, &c., and the levy was made accordingly.

Mr. Serjeant *Jones*, on an affidavit of these facts, on a former day in this Term, obtained a rule calling on the plaintiff to shew cause why he should not pay to the defendant the amount of the damages levied in this cause, and why it should not be referred to the Prothonotary to see whether the judgment and execution ought to stand, and, if so, for what amount?—The learned Serjeant also produced affidavits, which stated that the spring season of 1829 was very unfavourable for making roads, and that, consequently, the road-way in question could not be completely

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reinstated by the 15th of *April*, in that year. That the defendant could not procure the attendance of *Smith*, the surveyor, until the beginning of that month, when he saw what progress the defendant had made in reinstating the road, and expressed his satisfaction at what had been done, and gave instructions as to what it would be necessary for the defendant to do further, in order to the road's being effectually reinstated and made good, and which instructions were immediately attended to by the defendant, and that the road was completely reinstated by the middle of *June* following.

Mr. Serjeant *Taddy*, and Mr. Serjeant *Wilde*, now shewed cause, on affidavits which stated, that the defendant might have reinstated the road within the time limited by the *cognovit*. That the plaintiff never intended that *Smith*, the surveyor, should have any thing to do with the reinstating or making of the road, or have any control over it, or any power whatever of giving any directions respecting it, except that, at the expiration of the time limited by the *cognovit*, *Smith* was, in case any difference arose between the plaintiff and defendant, to decide whether or not the road had been properly reinstated according to the terms of the *cognovit*: that the plaintiff and several other persons had sustained great inconvenience by being so long deprived of the use of the road; that it still continued in a bad and improper state, and that the spring of 1829, was a proper time for reinstating the road. The learned Serjeant submitted, that the delay by the defendant to reinstate the road was most vexatious; that although the Court would not estimate the inconvenience and injury the plaintiff had sustained by being obliged to take a more circuitous route in consequence of the defendant's breaking up the road-way in question; yet that the *cognovit* was conclusive as between the parties, and that the Court had no authority to interfere, as the defendant had undertaken to pay the sum

of 200*l.*, as stipulated damages, in case the road were not reinstated to the satisfaction of a surveyor before a certain day, and which the defendant had failed to perform.

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Mr. Serjeant *Jones*, in support of his rule.—By the *cognovit*, the defendant engaged to reinstate the road-way to the satisfaction of a surveyor, agreeably to a plan agreed upon between the parties, and which plan contained several regulations and stipulations as to the mode of reinstating the road, and, in default of either of the acts required to be done by the defendant as stipulated in the *cognovit*, the sum of 200*l.* was not to be paid as liquidated or ascertained damages, but was in the nature of a penalty to secure the performance of the defendant's undertaking. The case of *Astley v. Weldon* (*a*), established the principle, that, where an agreement contains covenants for the performance of several things, and one large sum is stated to be payable upon breach of performance, it must be considered as a penalty. That case was recognized and adopted as an authority in the late case of *Kemble v. Farren*, where Lord Chief Justice *Tindal*, in delivering judgment, said (*b*)—"In *Astley v. Weldon*, there was a distinct agreement that the sum stipulated should be liquidated and ascertained damages. There were clauses in the agreement, some sounding in uncertain damages, others relating to certain pecuniary payments. The action was brought for the breach of a clause of an uncertain nature; and yet it was held by the Court, that, for this very reason, it would be absurd to construe the sum inserted in the agreement as liquidated damages, and that it was a penal sum only." So, here, the sum of 200*l.* cannot be considered as liquidated damages, as the defeasance in the *cognovit* was not limited to the performance of one specific act by the defendant, but extended to the performance of several and

(*a*) 2 Bos. & Pul. 346.

(*b*) *Ante*, 442.

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Wednesday,
Nov. 18th.

The KING v. The Sheriff of MIDDLESEX, in a cause of
LOGAN v. LOUEL.

Where, after added bail had justified, the rule for allowance was set aside, on the ground of perjury in one of the bail, who was rejected; the bail below are competent to render their principal at any time before the rule for setting aside the allowance is made absolute, if their names remain on the recognizance as such bail.

A RULE *nisi* was obtained by Mr. Serjeant *Spankie*, in the last Term, to set aside an attachment issued against the Sheriff of *Middlesex*, for not bringing in the body of the defendant *Louel*. The application was made on behalf of the bail to the Sheriff, and was founded on an affidavit, which stated that *Louel* was arrested on the 19th *June* last, in this action, at the suit of *Logan*. That *Louel* and his attorney executed a bail bond to the Sheriff of *Middlesex* on the 20th, and that thereupon *Louel* was discharged out of custody. That special bail had been put in, and that, on the 3rd *July*, *Louel* rendered in discharge of his bail, and that, on the 7th, an attachment issued against the Sheriff for not bringing in the body of *Louel*. *Louel's* attorney also swore that this application was really and truly made on his part, as bail for *Louel*, at his (the attorney's) own expense, and for his only indemnity, and without collusion with the defendant *Louel*.

Mr. Serjeant *Wilde*, and Mr. Serjeant *Jones*, on the first day of this Term, shewed cause, on affidavits, which stated, that the defendant *Louel* was arrested on a *capias* sued out at the suit of the plaintiff *Logan*, and returnable in eight days of the *Holy Trinity*, being the 21st *June* last. That, on the 25th, special bail was put in with the filacer; that, on the 26th, an exception was entered; and on the 27th, notice of adding and justifying was given for *Tuesday*, the 30th, when bail was added and justified accordingly; that notice of allowance of such added bail was served on the plaintiff *Logan*, who, on the 1st of *July*, obtained a rule calling on the defendant *Louel* to shew cause why the rule for the allowance of the said bail should not be set aside, which was moved for on the ground that one of

the bail had perjured himself as to the amount of his property. That the rule also called upon *William Walden*, one of the added bail, to appear personally in this Court, on *Saturday*, the 4th of *July*, and answer such matters as should be demanded of him. That, on the 3rd *July*, the defendant *Louel* was surrendered in discharge of his bail; that, on the 6th, cause was shewn against the above rule, when it was made absolute, and *Walden*, who attended in Court, was rejected as bail; and, on the same day, a rule absolute for an attachment against the Sheriff for not bringing in the body of the defendant *Louel*, was granted, and the attachment was issued on the 7th. It was also sworn, that, in the book kept by the warden of the *Fleet*, of the surrender of the defendant *Louel* in discharge of his bail in this action, the entry was as follows:—

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“ *Capias* against *Aristæus Louel*, at the suit of *Walter M'Gregor Logan*.

Oath 120*l*.

“ Bail are—*Henry Paulson*, of &c., painter, and *Thomas Allwood*, of &c., Gentleman.

Bail in 240*l*. Taken and acknowledged, 25th *June*, 1829, before

J. A. Park.

“ 30th *June*, 1829, *John Simmons*, of &c., victualler, and *William Walden*, of &c., leather dresser, added as bail in this cause, in Court, and at same time justified in 240*l*. each, and were allowed.

“ 3rd *July*, 1829.—The above-named defendant was surrendered in discharge of his bail in this cause, and was thereupon committed to his Majesty's prison of the *Fleet*, there to remain until &c., by—

N. C. Tindal.”

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It was also sworn that the attorney for the defendant *Louel* was the only surety who executed the bail bond to the Sheriff, and that he had admitted that he had signed the bond on *Louel's* undertaking to give him a sufficient sum to satisfy the plaintiff's debt and costs in the action, on the following day.

Under these circumstances, it was submitted that the attachment had been properly issued against the Sheriff, and that, as the application to set it aside was made on behalf of the bail, instead of the Sheriff himself, the Court would exercise their discretion, and not be fettered by any rule of practice or previous decision. The Sheriff has certainly failed in his duty, as he not only took a bail bond with one surety, but that surety was the attorney for the defendant in the original cause, and who now seeks to set aside the attachment. In the case of *The King v. The Sheriffs of London (a)*, where the Sheriff took a bail bond executed by one surety only, and an attachment was issued against him for not bringing in the body, the Court would not set aside the attachment, but ordered that it should stand as a security. Here, the render of the defendant *Louel* was clearly irregular, there being no bail in existence by whom it could be made; for, in *Mills v. Head (b)*, it was decided, that, where bail have been rejected, the defendant cannot surrender without putting in fresh bail, for, as soon as they are rejected, they are no bail. The bail to the Sheriff ceased to be bail in the cause when new bail were added, and when one of the added bail was rejected, there was no competent bail to render the defendant. But the case of *Brown v. Jennings (c)* is scarcely to be distinguished in circumstances from the present, where bail above having been put in and justified, the defendant, pending

(a) 9 B. Moore, 422; S. C. 2 Bing. 227.

(b) 1 New Rep. 137.

(c) 2 Barn. & Ald. 768.

a rule *nisi* for setting aside the allowance of such bail, on the ground that one of them had perjured himself as to the amount of his property, was rendered, and the rule *nisi* being afterwards made absolute, an assignment of the bail bond was taken;—it was held, that the assignment was regular, the render under such circumstances being insufficient. There, as here, the render was altogether invalid by the misconduct of one of the added bail, and when he was rejected, there were no bail in the cause by whom the defendant could be surrendered. Besides, in this case the bail below was the attorney for the defendant in the action; and in *George v. Barnsley (a)*, where one of the bail, of whom notice of justification was given, was an attorney, the Court refused time to add and justify another bail.

At all events, the affidavit in support of the application in this case is not sufficient, as the bail below only states that it was made by him as bail at his own expense, and for his indemnity only, and without collusion with the defendant *Louel*; and in the case of *The King v. The late Sheriff of London (b)*, the Court observed, that, although there was no rule in this Court, as in the *King's Bench*, still, that in future they would require, on a motion by bail to set aside an attachment against the Sheriff, that it should be sworn that the application was made at their expense, and without collusion with or indemnity from the defendant; and here the bail has omitted the latter part of the negation, and he might have been indemnified by the defendant, although he was not acting in collusion with him. On these grounds, but particularly as one of the added bail was rejected, the bail below were discharged, and must be considered as *functi officio*; and as rejected bail are not competent to render the defendant, the attachment ought to stand, and the Sheriff himself was the proper person to apply to set it aside.

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(a) 1 Chit. Rep. 8.

(b) 1 Moore & Payne, 177.

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Mr. Serjeant *Spankie*, in support of his rule.—The application being made by the bail below, he is entitled to the indulgence of the Court; and although he is an attorney, he was competent to become bail to the Sheriff; and, as long as his name remained on the bail piece, he was liable to an action at the suit of the original plaintiff; and, as his name still appears on the recognizance, he was authorized to render the defendant in his discharge; and although it has been said, that the affidavit he made in support of the application is insufficient in terms, yet it exactly follows the form prescribed by the rule of the Court of *King's Bench* (a); and, in *The King v. The Sheriff of London*, the affidavit did not state that the application was made at the expense of the bail. Here, the defendant was rendered four days before the attachment was issued, and before the rule for setting aside the allowance of the bail above was made absolute. In *Wild v. Harding* (b), it was held, that bail are not discharged on the surrender of their principal, unless an *exoneretur* be entered on the bail piece. In *Hall v. Walker* (c), the Court said that any bail were sufficient for the purpose of rendering the defendant; and here, the bail below was competent to do so, at any time before the rule for setting aside the allowance was made absolute. In *Bell v. Gate*, Mr. Justice *Heath* said (d): “This Court has, in several instances, freed the practice from the niceties which formerly prevailed in it respecting bail. It was once held, that after bail had been rejected, they could not surrender their principal. It is now held, that they may enter into a new recognizance for the purpose of making the render, and that any persons whatsoever, even if they came out of *Newgate*, may become bail for that purpose.” The case of *Brown v. Jennings* is distinguishable from the present, as there the

(a) See 2 Barn. & Ald. 240.

(b) 8 Mod. 281.

(c) 1 Hen. Bl. 638.

(d) 1 Taunt. 163.

bail disobeyed the order of the Court, by not appearing to be re-examined as to their sufficiency; and Lord Chief Justice *Abbott* was of opinion, that, under the special circumstances of that case, the render was not sufficient; and Mr. Justice *Bayley* said:—"If the bail to the Sheriff had exculpated themselves from any participation in the fraud, it might make a difference." Here, no fraud can be imputed to the bail below, who now makes this application *bond fide*, and he alone is responsible to the Sheriff if the attachment be allowed to stand. In *Jackson v. Trinder* (a), the Court held, that, although an attorney could not be allowed to justify, yet that he was sufficient bail to surrender, without justification; and, in *Edwin v. Allen* (b), it was decided that bail may render the defendant after an assignment of the bail bond, and without justifying. So, in the case of *The King v. The Sheriff of Essex* (c), it was held, that if, on exception to bail, notice be given of other bail, only one of whom justifies, and the names of the former still remain on the bail piece, the former may surrender the principal, for the Master reported to the Court that there should have been a rule to strike out the two first bail whose names stood on the bail piece, and that, until that was done, they might surrender the principal. So, here, as the name of the party who was bail to the Sheriff still remains on the recognizance, he was competent to render the defendant; and, as he was rendered before the rule for setting aside the allowance was made absolute, the attachment was improperly issued, and, therefore, ought to be set aside.

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Lord Chief Justice TINDAL now delivered the judgment of the Court, as follows:—

This was a rule obtained by the bail below for setting

(a) 3 Sir W. Bla. 1180.

(b) 5 Term Rep. 401.

(c) Id. 633.

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aside an attachment against the Sheriff of *Middlesex* for not bringing in the body; and the main question is, whether the render by the bail is good? As to which, it appears, that bail above was put in on the 25th *June*, and notice of exception having been given, two new bail were added; and, on the 30th *June*, notice of allowance of such added bail was served on the plaintiff. On the 1st *July*, the plaintiff obtained a rule to shew cause, on *Friday* then next, why the rule for the allowance of the said bail should not be discharged; and that *Walden*, one of the added bail, should appear personally in Court, to answer such matters as should be demanded of him. Cause was shewn against this rule on *Monday* the 6th, when the same was made absolute, and the attachment against the Sheriff issued on the 7th. In the meantime, however, *viz.* on *Friday* the 3rd *July*, the names of the original bail, and also of the added bail, still appearing on the recognizance, the defendant was rendered in discharge of his bail generally, and committed to the *Fleet*. And the question is, whether this is a valid render? We are all of opinion that it is. If the second bail had been rejected on the day they came up to justify, there is no doubt but that the defendant might have been rendered by the first bail at any time during the sitting of the Court. The first bail appear to be liable up to the time of justification of the second bail. But, in this case, the justification of the second bail, by matters *ex post facto*, became a nullity; and the second bail are to be considered as if they had never been put in at all. The first bail, therefore, being still upon the recognizance, no step having been taken to remove their names, still remained liable to the plaintiff, and, consequently, capable of rendering the defendant. The present case, therefore, is distinguishable from that of *Mills v. Head*, where the bail who had made the render had been rejected, which these first bail had not; and also from the case of *Brown v. Jennings*, where the render was made by the bail, whose justification was afterwards

set aside by the Court, on the ground of perjury. And when it is considered that the plaintiff, by the render of the defendant, has the very security which he originally contemplated when he arrested his person, it is not to be wondered at, that the cases have gone such length in allowing renders in discharge of the bail. Thus, in the *King's Bench*, a render by bail before they have justified, even though notice of exception has been given—or a render by rejected bail whilst their names remain on the bail piece; and in this Court—a render by rejected bail, who have entered into a new recognizance for the mere purpose of rendering, have all been held to discharge the bail. As to the objection that the party applying does not sufficiently deny that he has been indemnified, we think the affidavit sufficient, as it follows the very words of the rule in the Court of *King's Bench*, which has been adopted by practice in this Court. And as to the application being made by the Sheriff's bail, and not by the Sheriff himself, we observe, that that has occurred in many instances; and there appears no reason against it. On the whole, therefore, we think that the rule for setting aside this attachment against the Sheriff ought to be made—

Absolute.

Mr. Serjeant *Wilde* now moved that the bail bond might stand as a security, and referred to the case of *The King v. The Sheriffs of London (a)*.

But the Court said that there was no colour for the application.

The learned Serjeant, therefore, took nothing by his motion.

(a) 9 B. Moore, 422.

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Friday,
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ASH, Clerk, and MARY ANN his Wife, and LUCY WATTS,
Conusors; GEE, Conusee.

In 1807, a fine was duly proceeded with as far as the *allocatur*, and the clerk of the attorney for the conusors having received money to compound the fine at the alienation office, absconded with it, and neither the attorney nor any of the parties to the fine knew that the money had not been paid till 1829. The Court permitted the fine to pass as of *Trinity* Term, 1807, when it ought to have been perfected on payment of the king's silver as compounded for, on affidavits stating that all the parties interested consented to the fine being passed as of that Term, although both the conusors were dead.

IN 1807, the Reverend Mr. *Ash* married Miss *Mary Ann Watts*, who, with her sister *Lucy Watts*, were possessed of considerable freehold estates in the counties of *Gloucester* and *Wilts*. By an indenture of settlement, bearing date the 28th *May*, 1807, these estates were settled on *Ash*, the husband, for life, remainder to his wife for life, remainder to his children by the wife, in such proportions as she and her sister *Lucy* should appoint, pursuant to a power reserved in the deed of settlement. In *Trinity* Term, 1807, a fine was levied by the above parties, to enure to the uses of the settlement, and was duly proceeded with as far as the *allocatur*; and the conusor's attorney furnished his clerk with money to compound the fine at the alienation office, and to carry the same through the other different offices, in order that it might be completed. But the clerk absconded, taking the money with him, and did not inform the attorney that the fine had not been completed, and neither he nor any of the parties to the fine were aware that it had not been perfected until a few days previously to the commencement of this Term. Mrs. *Ash* and her sister *Lucy* made appointments in favour of the children of Mrs. *Ash*, by her husband, pursuant to the power contained in the deed of settlement. Mrs. *Ash*, and her sister, died shortly afterwards, the latter being unmarried. On affidavits, disclosing these facts, and that all the parties interested, of whom the son and heir of Mrs. *Ash* was one, were consenting to the application, and that all the children of the marriage were of age:—

Mr. Serjeant *Taddy*, on a former day in this Term, moved, that, upon payment of the king's silver, this fine might now pass as of *Trinity* Term, 1807; and he referred to the case of *Moule*, plaintiff; *Eyles* and Wife, deforci-

ants (a), where an attorney's clerk, who was employed to levy a fine, absconded, and the papers were mislaid, the Court allowed the fine to be perfected, although more than a year had elapsed; on an affidavit that the parties were all alive: and here, it is sworn, that all the parties now interested are consenting to the application. In *Barber*, plaintiff; *Nunn*, and Wife, deforciant (b), a fine was compounded for, and the pre-fine paid; and after passing the return, warrant of attorney, and *custos brevium* offices, was brought to the King's silver office, and the clerk there entered the king's silver or post fine in his book and on the writ of covenant, and the conusor had died previously, the Court said, "that the return of the writ of covenant was in the lifetime of the conusor; that, from that time, the Crown has a right to the post-fine, which was entered at the king's silver office, before any *caveat* against it; the making up the record in form is a ministerial act, not necessary to be done previous to the *caveat*, the entry by the clerk of the king's silver is sufficient;" and here the king's silver was compounded for at the alienation office and its amount settled, and an entry made accordingly. In *Viner's Abridgment* (c), it is said:—"If baron and feme levy a fine, and the conusance is taken six days before *Easter* Term, 7th *June*, and the writ of covenant is returned 15 *Paschæ*, which was the 3rd *May*, and the baron dies the 9th *May*, the king's silver not being entered, yet, if, upon examination, it appears that the clerk had entered the king's silver on paper, before any exception taken to it, and that now he had entered the king's silver upon the back of the writ of covenant, as it ought to be, the fine shall not be staid, for, when this is entered, it has relation to the return of the writ of covenant; and *Booth's* case, 7 *Jac.* 1, is referred to. Again (d), a feme covert, one of the conusors, died after

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(a) 1 B. Moore, 125.

(c) Tit. "Fine." (Q.) pl. 1.

(b) Barnes, 2nd Edit. quarto, 218.

(d) Vin. Abr. Tit. "Fine," (Q. 2), pl. 3.

9.

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the caption and after the teste, but before the return of the writ of covenant, and a *caveat* being entered, it was insisted that the king's silver was not paid before the wife's death; and, therefore, the fine ought not to pass. But, it was answered, that fines are common assurances, and that the acknowledgment makes the fine complete, and that the king's silver is the fine *pro licentia alienandi*, which is the pre-fine paid at the alienation office, and for which a receipt was indorsed on the writ of covenant, and is not part of the post fine, which is never collected till after the fine is completed; and the Court, after consideration, was of that opinion, and ordered the fine to pass; and the case of *Harneis v. Micklethwaite* (a), is referred to. So, a year having elapsed since the caption of a fine, it was stopped at the king's silver office for want of an affidavit that the parties were living; and one of the consors being dead, application was made in the treasury to the Judges, to strike him out, and that the fine might pass as to the other, which they denied, but made a rule that the surviving consor should shew cause why the fine should not pass generally as to all parties; and upon affidavit of service that rule was made absolute; and *Cotton v. Baylie* (c) is referred to. In *Bacon's Abridgment*, it is said (d), "from the entry of the king's silver, the fine is obligatory, and begins to operate, and thenceforth the fine shall stand, though either party die before the other parties are recorded. So, where, after consusance made, the consor died before the king's silver was paid, and, after his death, the silver was paid and entered on a writ of covenant returnable the term preceding his death; as where baron and feme made consusance before commissioners, on the 26th March, and the feme died the day following, and upon

(a) Barnes, 141.

(b) Vin. Abr. Tit. "Fine." (Q 2), pl. 4.

(c) Barnes, 142.

(d) 5th Edit. Vol. 3, 197

writ of covenant made returnable the *Hilary* Term preceding, the king's silver was entered as of that Term, the fine was adjudged to stand; for, where there does not appear an error on the face of the record, the Judges, in favour to fines, which so much strengthen men's titles, and quiet their possessions, have always supported them, and would not suffer the entering the king's silver after the parties' death, to be examined, when it appeared by the record itself, that the fine was completed as a fine of the term precedent the death of the conusor; and here, as the heir-at-law is one of the applicants, the Court have authority to order the fine to pass.

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GEE,
Conusee.

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Lord Chief Justice TINDAL, on this day said, that, having looked into the affidavits and authorities referred to, the Court thought it reasonable that the fine should pass as prayed.

Fiat.

CLARKSON v. LAWSON.

Friday,
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THIS was an action for a libel. The declaration stated, that, whereas the plaintiff now is a good, true, honest, just, and faithful subject of this realm, and as such hath always behaved and conducted himself, and until the committing of the several grievances by the defendant as hereinafter mentioned, was always reputed, esteemed, and accepted by and amongst all his neighbours and other good and worthy subjects of this realm, to whom he was

In an action for a libel published in a newspaper, charging the plaintiff, a proctor, with having been *thrice* suspended from practice for extortion:—The plaintiff alleged by way of special damage in the declaration, that his neigh-

bours suspected and believed him to be a person guilty of extortion, and refused to have any transactions or acquaintance with him, as they were accustomed to do previously to the publication of the libel. The defendant pleaded a justification, and alleged in the plea that the plaintiff had been suspended *once* for extortion:—*Held*, that the plea was bad on demurrer, as it did not justify the whole of the charge contained in the libel.

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in anywise known, to be a person of good name, fame, and credit, to wit, at &c. And whereas also, the plaintiff, at the time of the committing the several grievances by the defendant, as thereafter mentioned, had been, and was, and still is, one of the proctors general exercent of the *Arches* Court of *Canterbury*, and other Ecclesiastical and Maritime Courts in *Doctors' Commons*, and had used, exercised, and carried on the profession and business of a proctor with great credit and reputation, and had thereby acquired great gains, profits and advantages, and, as such proctor, had always conducted himself with great honesty and integrity:—Yet, the defendant, well knowing the premises, but greatly envying the happy state and condition of the plaintiff, and contriving, and wickedly and maliciously intending to injure the plaintiff in his said good name, fame, and credit, and in his said profession or business, and to bring him into public scandal, infamy, and disgrace, with and amongst all his neighbours, and other good and worthy subjects of this kingdom, and to vex, harass, oppress, impoverish, and wholly ruin him the plaintiff, theretofore, to wit, on &c., at &c., falsely, wickedly, and maliciously, did publish, and cause and procure to be published, of and concerning the plaintiff, and of and concerning him in his said profession or business, a certain false, scandalous, malicious, and defamatory libel, containing, amongst other things, the false, scandalous, malicious, defamatory, and libellous matter following, of and concerning the plaintiff, and of and concerning him in his said profession or business, that is to say—
 “With respect to the employment of proctors, it was strange that Mr. *Peddle*, who now changed his proctor, should have gone from Mr. *Toller* to Mr. *William Geery*, jun. (thereby meaning the plaintiff), who (thereby meaning the plaintiff) had been suspended three times, once by Lord *Stowell*, and twice by Sir *John Nicholl*. He (a) was anxious to particularize the (thereby

(a) The writer of the libel.

meaning the plaintiff's) name, in order to distinguish him (the plaintiff) from others who did not wish to be confounded with him."

The plaintiff, in the second count, averred, that the defendant, further contriving and intending as aforesaid, theretofore, to wit, on &c., at &c., falsely, wickedly, and maliciously, did publish a certain other false, scandalous, malicious and defamatory libel of and concerning the plaintiff, and of and concerning him in his said profession or business, in the form of, and as, a letter addressed to the editor of the "*Times*" newspaper, in which said letter was and is contained, amongst other things, the false, scandalous, defamatory, and libellous matter following, that is to say—"Sir, Common justice will, I am satisfied, induce you to correct a misprint in your paper, (meaning the *Times* newspaper), in your report of Dr. *Lushington's* speech upon the subject of the charge against Sir *John Nicholl*, in which you (meaning the editor of the *Times* newspaper), represent him as stating that, Mr. *William Geery*, jun. was the proctor who had been thrice suspended from practice for extortion, that person, Sir, was *William Geering Clarkson*, (meaning the plaintiff), and not, Sir, your humble servant, *Wm. Geery*, junr."

By means of the committing of which said several grievances by the defendant as aforesaid, he, the plaintiff, had been greatly injured in his said good name, fame, and credit, and brought into public scandal, infamy, and disgrace, with and amongst all his neighbours, and other good and worthy subjects of this realm; insomuch that divers of those neighbours and subjects, to whom the innocence and integrity of the plaintiff in the premises were unknown, had, on account of the committing of the said grievances by the defendant as aforesaid, from thence hitherto suspected and believed, and still do suspect and believe the plaintiff to have been, and to be, a person guilty of extortion, and had, by reason of the committing

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of the said grievances by the defendant as aforesaid, from thence hitherto wholly refused and still do refuse to have any transactions, acquaintance, or discourse with him the plaintiff, as they were before used and accustomed to have, and otherwise would have had; and also, by reason thereof, the plaintiff had been and is greatly prejudiced in his credit and reputation aforesaid; and has been greatly vexed, harassed, oppressed and impoverished, and had also lost and been deprived of divers great gains and profits, which would otherwise have arisen and accrued to him in his said profession or business, and had been and is otherwise much injured and damnified therein, to wit, at &c.

The defendant pleaded, as to the publishing, and causing and procuring to be published, so much of the said supposed libellous matter as imputes or charges to or against the plaintiff, that he, before the said several times when, &c., had been suspended in his aforesaid profession and business of a proctor, above supposed to have been done by the defendant, the defendant said, that the plaintiff ought not to have or maintain his aforesaid action thereof against him, because he saith, that the plaintiff, before the said several times when &c., in the said declaration mentioned, to wit, on &c., had been employed in the way of his aforesaid profession and business of a proctor, by one *Thomas Gillart*, and afterwards, and before the said several times when &c., to wit, on &c., falsely, fraudulently, and extortionately demanded of and from the said *Thomas Gillart*, as and for the sum of money justly due to him the plaintiff, from the said *Thomas Gillart*, for the work and labour of him the plaintiff as such proctor, done, performed, and bestowed in and about the business of the said *Thomas Gillart*, in pursuance of the aforesaid employment, and for fees and disbursements due and made to and by him as such proctor, in respect thereof, a certain large sum of money, to wit, the sum of 19*l.* 14*s.* 4*d.*, whereas, in truth, and in fact, the sum of money then and there justly due to him the plaintiff, in that be-

then and there amounted to a much less sum of money, to wit, the sum of 9*l.* 19*s.* 8*d.*:—and the defendant further said, that afterwards, and before the said severals times, when &c., to wit, on &c., Sir *John Nicholl*, then being Judge of the Prerogative Court of *Worcester*, caused the aforesaid false, fraudulent, and extortionate demand to be taxed by the proper officers of said Court in that behalf, to wit, the Rev. *George* *re*, *Charles Moore*, Esq., and the Rev. *Robert* *re*, Registrars of the said Court, and that the said persons, by their deputy in that behalf, did afterwards, before the said several times, when &c., to wit, on &c., report in the said Court to the said Sir *John Nicholl*, and being such Judge as aforesaid, according to the custom and practice of the said Court, that, upon such taxation of the aforesaid false, fraudulent, and extortionate demand, a small part thereof, to wit, the sum of 9*l.* 8*d.* only, had been found justly due to the plaintiff by the said *Thomas Gillart*:—and the defendant further said, that thereupon, by reason of the premises, afterwards, and before the said several times, when &c., to wit, on &c., the said Sir *John Nicholl*, as and being Judge of the said Court, did order, direct, and adjudge, that the said plaintiff should be suspended, and did suspend, the said plaintiff from transacting the business of a proctor in the said Court, for the space of one year then next following, and did then and there direct, that, at the expiration of said space of one year, the plaintiff should be further suspended until he should appear, and publicly make a solemn promise to abstain from all mal-practices in the exercise of his business as a proctor in the said Court:—and the defendant further said, that the said Sir *John Nicholl*, in this plea mentioned, and Sir *John Nicholl*, in the said supposed libels named, are one and the same person. Wherefore, the defendant afterwards, at several times, when &c., did publish, and cause

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and procure to be published, so much of the said supposed libellous matters in the said declaration mentioned, as imputes or charges to or against the plaintiff, that he the plaintiff, before the said several times, when &c., had been suspended in his aforesaid profession and business of a proctor, as he the defendant lawfully might, for the cause last aforesaid; which are the same publishing and causing and procuring to be published the said supposed libellous matters as are in the said declaration mentioned. And this &c. Wherefore &c.

To this plea the plaintiff demurred specially, assigning for causes, that the plea purports to be a justification as to the printing and publishing, and causing to be printed and published, so much of the said libellous matters as imputed or charged to and against the plaintiff, that he, before the said several times, when &c., had been suspended in his aforesaid profession and business as a proctor; whereas, although the said libellous matters impute and charge to and against the plaintiff, that he had been *three times* suspended from exercising his profession or business of a proctor; yet, the defendant in his plea states only, that the plaintiff was *once* suspended from exercising his said profession and business of a proctor; and also, that the plea affects only to answer, and in truth is only an answer to part of the declaration, instead of being an answer to the whole, and also, for that it is manifestly inconsistent to attempt to answer a libel comprising an indivisible charge, by shewing that part only of the charge is true.

There was another plea of justification nearly similar to the above, and on which issue was joined.

The cause now came on for argument.

Mr. Serjeant *Cross*, in support of the demurrer.—The declaration charges the defendant with the publication of a libel, in which the plaintiff is alleged to have been sus-

pended three times, *viz.* once by Lord *Stowell* and twice by Sir *John Nicholl*; and also, that the plaintiff had been thrice suspended from practice for extortion. The defendant has not pleaded the general issue, but, by way of justification, has alleged that the plaintiff was only directed to be suspended once by Sir *John Nicholl*, instead of twice, and omitted to state altogether that he had been also suspended by Lord *Stowell*. The plea, therefore, is bad in form and in substance, as it only contains an answer to part of the libel as set out in the declaration; and the causes assigned by the plaintiff in his demurrer are of themselves conclusive to shew that the plea cannot be supported.

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Mr. Serjeant *Wilde, contra.*—The plea must be looked at with reference to the declaration, and if it answers the sting or substance of the libel there set out, it is sufficient. The libel is not actionable *per se*, it could only become so, when it might be calculated to produce an injury to the party against whom it was written, as, by raising a prejudice against him by the public, or in the minds of his friends or acquaintance; and here, the plaintiff has merely alleged, that by means of the publication of the libel, divers of his neighbours suspected and believed him to have been, and to be, a person guilty of extortion, by which he was greatly prejudiced in his credit and reputation, and had also been deprived of certain profits which would otherwise have arisen and accrued to him in his profession or business of a proctor. The plaintiff, therefore, pointed out the only evil produced by the publication of the libel, *viz.* that he had been suspected to have been guilty of extortion: that is the only charge alleged, by which the plaintiff has sustained an injury, and which the defendant has answered by averring in his plea that the plaintiff had made an extortionate demand on a person named in the plea, and for which the plaintiff was ordered to be suspended from exercising the business of

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a proctor for the space of one year; and if he were once fixed with the misconduct imputed to him, the disrepute or discredit which must naturally follow, would not be increased by his neighbours and acquaintance knowing that the offence had been repeated; and, if the defendant proves at the trial, that the plaintiff has been guilty of extortion, and been suspended from exercising his business as a proctor; it will be a sufficient justification of the publication of the alleged libel. In *Edwards v. Bell* (a), the plaintiff, a dissenting minister, in his declaration, charged the defendants, the proprietors of a newspaper, with publishing therein the following libel:—"A serious misunderstanding has recently taken place amongst the independent dissenters of *Great Marlow*, and their pastor, in consequence of some personal invectives, publicly thrown from the pulpit by the latter against a young lady of distinguished merit and spotless reputation. We understand however, that the matter is to be taken up seriously." The defendant, by way of justification, pleaded, that the plaintiff, just before his preaching and delivering a certain discourse or sermon, addressed by him, as such pastor, to a certain congregation of dissenters, in a certain chapel, and that, whilst he was officiating in the said chapel, as pastor or minister, spoke and published from a certain part or station of the said chapel assigned to him, as pastor or minister, for the preaching and delivering of the discourse or sermon, to and in the presence of the congregation, of and concerning one M. F., these scandalous words following:—"I have something to say, which I have thought of saying for some time, namely, the improper conduct of one of the female teachers; her name is Miss F.; her conduct is a bad example and disgrace to the school, and if any of the children dare ask her to go home, she shall be turned out of the school, and never enter it again. Miss does more harm than good;"—and thereby gave ground

(a) 8 B. Moore, 467; S. C. 1 Bing. 403.

ance to divers of the dissenters, to wit, one *A. B.*, one *C. D.*, and one *E. F. &c. &c.*, and occasioned a serious misunderstanding amongst the dissenters in the declaration mentioned.

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The Jury having found a verdict for the defendants on this plea, it was held, on a motion in arrest of judgment, that the plea was a sufficient answer to the libel as charged in the declaration; although it was objected that the words contained in the plea did not furnish a sufficient defence to the action, or answer the plaintiff's charge as laid in the declaration, on the ground (among others) that it must be inferred from the terms of the libel, that a serious misunderstanding had taken place amongst the independent dissenters and their pastor, whereas, by the plea, it was alleged that a serious misunderstanding had been occasioned amongst the dissenters themselves, and not between them and their pastor; and Lord Chief Justice *Gifford* said (a)—“It has been objected, that the libel set forth that a serious misunderstanding had taken place amongst the dissenters and their pastor, whilst the plea merely alleges that the words gave great offence to divers, *viz.* to six only of the dissenters therein named; but, it proceeded to state, that it occasioned a serious misunderstanding amongst the dissenters in the declaration mentioned. The plea, therefore, substantially justifies that part of the charge as contained in the libel.” And Mr. Justice *Park* observed (b)—“It has been said, that it is stated in the libel, that there was a serious misunderstanding between the dissenters and their pastor, and that the plea merely alleges that the misunderstanding existed amongst some of the congregation only, and not as between the body of dissenters and their pastor. But that was not the gist of the libel, and even if it had been, the pastor himself might most properly be termed a dissenter, and if he had any misunderstanding with his congregation, or a part of them, it would amount to a misunderstanding among the dissenters.” And

(a) *B. Moore*, 477.(b) *Id.* 478.

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Mr. Justice *Burrough* said (a)—“ It is sufficient if the substance of the libellous statement has been answered, or can be justified, and it is unnecessary to repeat every word of the libel complained of, or which might have given rise to the original comment. The defendants have justified so much of the libel as takes away the sting of the charge therein contained. Every matter extraneous to it need not be justified.” So, here, the plaintiff has alleged the sting of the libel to be that he has been suspected to have been guilty of extortion, and that charge the defendant has attempted to justify in his plea, and if he prove that the plaintiff made an extortionate demand, in consequence of which he was suspended from exercising the business of a proctor, it will be a complete answer to the action; and it is immaterial whether the plaintiff was suspended once or thrice, as the only grievance or ground of complaint is, that he had been suspected to have been guilty of extortion.

Mr. Serjeant *Cross*, in reply, was stopped by the Court.

Lord Chief Justice TINDAL.—The plaintiff, in the first count of the declaration, alleges the libel to have been published of him in his profession and business of a proctor, and that he the plaintiff, had been suspended from his employment as such, three times, once by Lord *Stowell*, and twice by Sir *John Nicholl*. The libel in the second count also charges the plaintiff with having been thrice suspended from practice, for extortion. The plea professes, on the face of it, to be an answer to the whole of the charge contained in the libel as set out in the declaration, for it states, that, before the publication of the libel, the plaintiff had been employed in the way of his aforesaid profession and business of a proctor, by one *Thomas Gillart*, and that he extortionately demanded money from him, for work and labour done by the plaintiff, as

(a) 8 B. Moore, 479.

such proctor, and that Sir *John Nicholl*, being then Judge of the Prerogative Court, caused the extortionate demand to be taxed by the proper officers of that Court; and that, thereupon, the said Sir *John Nicholl*, as such Judge of the said Court, did suspend the plaintiff from exercising the business of a proctor in the said Court, for the space of one year." The plea, therefore, only professes to justify the suspension of the plaintiff by Sir *John Nicholl*, once, whereas, in the declaration, it was alleged, that he was suspended three times, *viz.* once by Lord *Stowell*, and twice by Sir *John Nicholl*. I therefore think that, looking at the declaration and the plea together, the latter falls within that class of cases where it has been decided, that if a plea professes to be an answer to the whole of a declaration, but is only an answer as to part, it is bad altogether. But, it has been said, that it is sufficient if the defendant answers the sting and substance of the libel, which, according to the plaintiff's own shewing, is, that the plaintiff has been suspected to have been guilty of extortion, for that he has alleged, that, by means of the committing of the grievances by the defendant, he, the plaintiff, hath been suspected and believed, by his neighbours and others, to have been and to be a person guilty of extortion. But the plaintiff is charged in the libel, as set out in the declaration, with having committed various offences differing from that attempted to be justified; for the stigma on his character would be infinitely increased, if he had been suspended three times from his office or business of a proctor, instead of once only. If an attorney, who had been struck off the roll and restored, should be struck off a second time, it would be a far greater stain on his character, than if he had been struck off but once. To say, therefore, that a proctor had been thrice suspended, and which fact was made a substantive charge in the libel, and so alleged in the declaration, it is no answer, in a plea of justification, to say, that he was suspended but

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once. This case, therefore, appears to me to fall within the principle of those in actions for verbal slander, where a plea of justification to part of the words alleged to have been spoken has been held to be no answer, but that the plea of justification must confess the speaking of the words alleged, otherwise it is bad. In *Johns v. Gittins* (a), the declaration was—"Thou hast played the thief with me, and hast stolen my cloth, and half a yard of velvet." The defendant pleaded, by way of justification, that the plaintiff was his tailor, and that the defendant had delivered to him a yard and a half of velvet to make him a pair of hose, which he made too little, *ratione cujus* the defendant spoke these words—"Thou hast stolen part of the velvet which I delivered you, *absque hoc*, that he spoke any words *aliter vel alio modo*;" upon which the plaintiff demurred, and the Court held that a manifest fault was alleged in the plea, as the defendant did not answer the words—"thou hast stolen my cloth." That case is cited as an authority by Mr. Serjeant *Williams*, in a note to *Craft v. Boite* (b). We are not, in this case, to look at the allegation of special damage at the conclusion of the declaration, but at the nature of the charge imputed to the plaintiff by the libel therein set out, and to see whether the defendant, in his plea of justification, has answered the whole of that charge, by alleging, in terms, that it is true. The libel has charged the plaintiff with having been thrice suspended from his practice as a proctor, *viz.* once by Lord *Stowell*, and twice by Sir *John Nicholl*; now there are three specific charges, and the defendant, in his plea, has only alleged that the plaintiff was suspended once by Sir *John Nicholl*. This is certainly no answer to the three charges of suspension, as alleged in the declaration. I am therefore of opinion, that the

(a) Cro. Eliz. 239.

(b) 1 Wms. Saund. 4th edit. 244 a.

plea is bad, and that the plaintiff is entitled to judgment.

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Mr. Justice PARK.—I entirely concur with my Lord Chief Justice. In *Edwards v. Bell*, the Court were of opinion that it was sufficient, if the defendant, in his plea, answered the general sting or charge of the libel as set out in the declaration. The libel there contained a charge on the plaintiff, a dissenting minister; and, if three specific offences had been imputed to him, or three several charges alleged, as in this case, and the defendant had justified one only, that case might have been applicable. But, it has been said, that the impression on the mind of the public would have been equally strong, if the plaintiff had been once suspended for extortion, as if he had been suspended three times, and that he would not have fallen into greater disrepute by the imputation of several offences, than by the imputation of one only. If an attorney be struck off the roll for mere mal-practice, and is afterwards restored, yet, if he be struck off a second time for gross misconduct, it cannot be said for a moment that his character and reputation would stand in the same light as if he had only been struck off but once. Here, the libel charges the plaintiff with having been suspended three times; once by Lord *Stowell*, and twice by Sir *John Nicholl*; and yet the defendant, in his plea, only alleged that the plaintiff had been suspended by Sir *John Nicholl*, from which it must be inferred, that he was never suspended by Lord *Stowell* at all. According, therefore, to the established rule of pleading, that if a defendant, in an action of slander, professes, in his plea, to justify the whole of the words spoken, but justifies a part only, the plea is altogether bad, as it does not contain an answer to the whole of the words alleged to have been spoken of the plaintiff, as set out in the declaration.

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Mr. Justice BURROUGH.—It is a general rule, that if a plea begin as an answer to the whole of a declaration, but the matter pleaded be only an answer to part, such plea is a nullity. So, if an entire plea be bad in part, it is insufficient for the whole; as, in an action against an executor or administrator, if he plead several judgments recovered against himself in that character, and that he has not sufficient to satisfy them; if the plea be bad or false as to one of the judgments, it will be bad for the whole. Here, the gist of the action is the charge contained in the libel, that the plaintiff was suspended three times, and not the consequence that resulted from the defendant's publishing that the plaintiff had been so suspended. I am therefore clearly of opinion, that, as the defendant has, in his plea, professed to answer the whole of the libel as set out in the declaration, but has answered part only, the plea is bad in form and in substance, and, therefore, that the plaintiff is entitled to judgment.

Mr. Justice GASELEE.—I never entertained the least doubt in this case, and was surprised to find, that the question was really intended to be argued. The defendant has not attempted to answer the substantive part of the libel, but only the consequence that the plaintiff alleged accrued to him from its publication, and which was only matter of special damage. If he had omitted to state that his neighbours and others had suspected him to have been guilty of extortion, but merely alleged that he was injured in his good name, and brought into disgrace with and amongst all his neighbours and other subjects, it would have been sufficient, and on which the action might have been maintained.

Judgment for the plaintiff.

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THIS was an action of *assumpsit* for the agistment of cattle. The defendant pleaded—*First, non assumpsit*;— and *Secondly, non assumpsit infra sex annos*; on which issues were joined.

The cause came on for trial, before Lord Chief Justice *Best*, at the last *Spring Assizes at Leicester*. The declaration was intituled of *Hilary Term, 9 & 10 Geo. 4, (1829)*, and it appeared that the cattle were depastured in 1818, being more than ten years before the commencement of the action. But, in order to take the case out of the operation of the statute of limitations, a witness was called, who said, that the defendant was at his house in *February, 1828*; that the plaintiff's brother was there, and that the defendant said to him—"I owe your brother seven or eight pounds, and, if I do, he shall have it, I wish that nobody should lose any thing by me." Another witness proved, that, shortly afterwards, he heard the defendant say to the plaintiff's brother—"Your brother *Ned* wants seven or eight pounds from me, we must settle it; nobody shall lose by me."

For the defendant, it was objected, that the statute 9 *Geo. 4, c. 14* (Lord *Tenterden's* act) precluded the plaintiff from his right to recover in this action, as the first section enacts—"That, in actions of debt, or upon the case, grounded upon any simple contract, no acknowledgment or promise by words only shall be deemed sufficient evidence of a new or continuing contract, whereby to take any case out of the operation of the said enactments (*viz.* the enactments contained in the statute 21 *Jac. 1, c. 16*), or either of them, or to deprive any party of the benefit thereof, unless such acknowledgment or promise shall be made or contained by or in some writing to be signed by the party chargeable thereby."

The first section of the statute 9 *Geo. 4, c. 14*, enacts, that in actions grounded on contract, no acknowledgment shall be deemed sufficient evidence of a new or continuing contract, unless such acknowledgment be in writing, and signed by the party chargeable: *Held*, that that clause has a retrospective operation, and applied to a parol acknowledgment made before the provisions of the statute came into effect, although the acknowledgment was made before the passing of the act.

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For the plaintiff, it was insisted, that, as the promise or acknowledgment by the defendant was made before the 1st *January*, 1829, being the day on which the statute was, by the 10th section, to come into operation, it was sufficient (a), although such acknowledgment was not reduced into writing. His Lordship left it to the Jury to say whether the words proved to have been spoken by the defendant to the plaintiff's brother amounted to a promise to pay? They found in the affirmative, and also, that the defendant had acknowledged that he owed the plaintiff 7*l.* 10*s.* His Lordship, however, being of opinion that this case fell within the operation of the statute 9 *Geo.* 4, not-suited the plaintiff, as the promise by the defendant had not been reduced into writing; reserving to the plaintiff liberty to move to set aside the nonsuit, and that a verdict might be entered for him for the sum found to be due by the Jury, in case the Court should be of opinion that the case did not fall within the terms or meaning of the statute.

Mr. Serjeant *Merewether*, in the last *Easter* Term, obtained a rule *nisi* accordingly; and submitted, that Lord *Tenterden's* act was not intended to apply to oral promises or acknowledgments made previously to the 1st *January*, 1829, particularly as it contained no clause or provision to give it a retrospective operation; and it is an established rule, in the construction of statutes, that they are not to operate retrospectively, unless they contain express words to that effect.

Mr. Serjeant *Adams*, afterwards, (*viz.* in the same Term) shewed cause.—The express object of the Legislature in passing the statute in question, was, to put an end to all *parol* acknowledgments or promises, by which an old debt

(a) The 10th section enacts, and take effect on the 1st day of
 "That the act shall commence *January*, 1829."

might be revived, so as to bring it within the meaning or operation of the statute 21 *Jac.* 1, c. 16. Although the late act is silent as to the effect of a promise made before or after the commencement of an action, yet there can be no doubt as to its interpretation or grammatical construction. The act was passed on the 9th *May*, 1828, and the 10th section postponed its operation to the 1st *January*, 1829, so as to enable all persons who relied on verbal promises or acknowledgments of debts, to commence actions immediately, and prosecute them so as to obtain judgment previously to the day on which the act was to take effect. Here, the defendant, in *February*, 1828, acknowledged that he owed the plaintiff a certain sum, and he might have proceeded to trial at the *Spring Assizes* in that year; instead of which he did not commence the present action until the last *Hilary Term*. The noble Lord who framed the act, thought that all persons who relied on parol acknowledgments previously to its passing, might and ought to sue for them immediately, and to prosecute their suits during the interval of eight months; before the expiration of which period it was not to come into operation; and after the 1st *January*, 1829, no acknowledgment or promise by words was to be deemed a sufficient evidence of a new or continuing contract; nor could such acknowledgment be received, unless it were in writing, and signed by the party chargeable thereby; and here, the action was not commenced until after the 1st *January*, 1829, *viz.* in *Hilary Term* in that year.

Mr. Serjeant *Merewether*, in support of his rule.—The Legislature did not mean to deprive a party of any right he might have acquired previously to the passing of the act; and it is not to be presumed, that, in this case, the plaintiff was aware that the statute had passed, much less of its effect, and he therefore ought not to be deprived of his

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remedy against the defendant on the acknowledgment or promise made by him, and which, but for the operation of the late statute, the plaintiff might have availed himself of in this action. But the Court cannot so construe the act as to give it a retrospective effect or operation, unless it contains provisions to that effect, or the Legislature have so expressed it. Lord *Coke*, in commenting on the words of the statute of *Gloucester* (a), ‘if a man alien a tenement,’ says (b)—“This extendeth to alienations made *after* the statute, and *not before*; for it is a rule and law of Parliament, that regularly *nova constitutio futuris formam imponere debet, non præteritis*.” And Mr. Justice *Blackstone* says (c)—“All laws should be made to commence *in futuro*.” But the case of *Gilmore v. Shuter* (d), bears a near resemblance to the present, and is not to be distinguished in principle. That was an action of *assumpsit* against an executrix, on a promise by the testator, that, in consideration that the plaintiff, at the request of the testator, would marry the daughter of one *Harris*, the testator promised to give the plaintiff in his life-time, or leave him at his death, as much as *Harris* should give in portion with his daughter. The plaintiff averred that *Harris* gave, in portion, 2000*l.*, but that the testator omitted to fulfil his promise. Plea—*Non assumpsit*. The Jury, by a special verdict, found that the promise was made in *February*, 1676, that there was no note or memorandum in writing, and that the testator died in *August*, 1677. The statute 29 *Car. 2*, c. 3, passed in 1676, and was read a third time in the House of Lords, on the 7th of *March* in that year, and the fourth section provided, that, “from and after the 24th *June*, 1676, no

(a) 6 *Edw. 1*, c. 3.

(b) 2nd *Inst.* 292.

(c) 1 *Bl. Com.* 46.

(d) *Sir Thomas Jones*, 108; *S.*

C. 2 *Show.* 17; 1 *Vent.* 330; 2

Mod. 310; 2 *Lev.* 227; 1 *Freem.* 466.

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action should be brought whereby to charge any person upon any agreement made upon consideration of marriage, &c., unless the agreement upon which such action should be brought, or some memorandum thereof, should be in writing, and signed by the party, or some other person thereunto by him lawfully authorized." The question was, whether a promise made before the act, but to be performed after, would sustain an action without note in writing. *Maynard*, Serjeant, for the defendant, relied on the express words of the act, than which, he said, nothing could be plainer, and that it was never heard that negative words in a statute *introductive*, should be interpreted against the express letter. *Pollexfen*, for the plaintiff.—The penning and words of the statute do plainly intend only promises after the 24th of *June*, and never designed a retrospect to avoid marriage agreements made and concluded at any time before. No act of Parliament shall be intended to be made against natural justice, as it would be, if this act should be taken literally; for then good and legal causes of action for debts, or other things, upon promises made upon good and valuable consideration, would be destroyed, and utterly taken away by the retrospect of the law, which nobody could divine would be made. And he referred to the opinions of the Judges at *Serjeants' Inn*, where, in a case of devise of land, without three witnesses, made and published before the act, the testator dying after the act, yet, it was held good, though it was no devise till after the testator's death. The title and style of the act was plain enough, that designed only a prospect for the future, for it was for *the prevention of frauds*. The whole Court, (except *Twisden*, J., who was absent) were of opinion, that the action lay notwithstanding the act, and that the act did not extend to promises before the 24th of *June*; and judgment was given for the plaintiff; and they said, that, by an easy transposition of the words of the act, a construction agreeable to justice might be made, *viz.* where the words are,

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"after the 24th *June*, no action shall be brought for a promise of marriage without note or writing, &c," the words so transposed, "no action shall be brought for any promise after the 24th *June*," there is no retrospect or other injury to any one, and it is usual to make such transposition of words, to make private contracts agree with the intention of the parties, as upon a lease dated 26th of *March*, for years, rendering rent at the *Annunciation* and *Michaelmas* during the term, the first rent shall be paid at *Michaelmas*, *a fortiori*, to make acts of Parliament not repugnant to common justice.

There, as here, there was an interval between the time the statute was read the third time in the House of Lords in the month of *March*, and the time when it was to take effect, *viz.* in the month of *June* following; and yet the Court held that the act was not retrospective, and did not extend to promises made before the 24th of *June*, the day specified in the act. Here all the clauses of the act have a prospective view, and the words in the first section, that unless *such acknowledgment* or promise *shall be made*, are clearly prospective, and must be taken to refer to acknowledgments or promises which should or might be made after the act came into operation. So, the words *to be signed* can only apply to a signature by the party to be charged after the making of the act. The case of *Gilmore v. Shuter*, was recognized as an authority in *Couch v. Jeffries* (a), where, in an action for a penalty for not paying the stamp duty upon an indenture of apprenticeship; after verdict for the plaintiff, a motion was made in arrest of judgment, on the ground that the defendant had, since the verdict, and before the 1st *September*, 1769, paid the duties under the statute 9 *Geo.* 3, c. 37, s. 4, which passed in the last Session, and which discharges the penalty incurred, on payment of the duties on or before the 1st *September*, 1769. The

(a) 4 Burr. 2461.

action was brought and tried before the passing of that act, and the question was, whether the act should relate to actions commenced before the first day of the Session in which it passed. The act contained no proviso as to actions already commenced; and Lord *Mansfield* said—"Here is a right vested; and it is not to be imagined that the Legislature could, by general words, mean to take it away from the person in whom it was so legally vested, and who had been at a great deal of cost and charge in prosecuting. They certainly meant future actions." In *Wilkinson v. Meyer (a)*, which was an action of covenant on an indenture for the transfer of *South Sea* stock, the defendant pleaded that the contract was not duly registered in the *South Sea* Company's book, according to the 7 *Geo.* 1, stat. 2, s. 8, which was passed subsequently to the date of the indenture; and Mr. Justice *Raymond* said—"This act being *ex post facto*, the construction of the words ought not to be strained, in order to defeat a contract, to the benefit whereof the party was well entitled at the time the contract was made." So, here, the plaintiff was entitled to the benefit he might and would have derived from the acknowledgment made by the defendant, that he was indebted to the plaintiff in a certain sum, if the late act had not been passed; and it would be a great hardship to deprive him of his remedy by giving the statute a retrospective operation.

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Lord Chief Justice *Best* said—That, as he understood that there was a similar question pending on a rule for a new trial in the Court of *King's Bench*, and that it was highly desirable that there should be uniform and consistent decisions on so important a point, and on the construction of so recent a statute, the Court would consult with the other Judges.

Cur. ade. vult.

(a) 2 Lord Raym. 1352.

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Mr. Justice PARK now delivered the judgment of the Court as follows:—

This was an action brought for the agistment of cattle. The debt was, at the time of the action brought, of above six years standing. The evidence was, that the defendant was at the house of the witness in *February*, 1828, and said, to the plaintiff's brother, "I owe your brother seven or eight pounds, and if I do he shall have it. I wish that nobody should lose any thing by me." At another time the defendant said "Your brother *Ned* wants seven or eight pounds from me: we must settle it—nobody shall lose by me." The action was not brought till *Hilary* Term of the present year. If this *verbal* promise was good, the promise was within six years;—but more than six years since the cause of action first accrued had elapsed when the action was brought. And it was insisted that the plaintiff could not recover, for that, by the statute 9 *Geo.* 4, c. 14., (commonly called Lord *Tenterden's* act,) in cases of simple contract, no acknowledgment or promise by words only shall be deemed sufficient evidence of a new or continuing contract, whereby to take any case out of the operation of the said enactments, (that is, the statute of limitations), or to deprive any party of the benefit thereof, unless *such acknowledgment or promise shall be made or contained by or in some writing to be signed by the party chargeable thereby.* On the other hand, it was said, that, as the promise *by words* in this case was made before the operation of the new statute, the action was maintainable. Lord Chief Justice *Best* took the opinion of the Jury whether the words proved amounted to a promise to pay. They said they thought they did. His Lordship then nonsuited the plaintiff, on the ground that the promise should have been in *writing*, according to the provisions of the new act, giving the plaintiff leave to move to enter a verdict for the sum in proof, if this Court should differ from him.—But my brothers *Burrough* and *Gaselee* think, and I agree with them, that this action, not having

been brought till *Hilary* Term, 1829, and this act having begun to run *from the 1st of January* in the present year, cannot be maintained upon a *verbal* promise.

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Every man who has attended a Court of Justice, for some years, must have observed how very vaguely and loosely many of these verbal promises, which were to take a case, as it was called, *out* of the statute of limitations, were made and proved—and therefore it well became him, who introduced this act, to endeavour to provide a remedy for so great an evil.—The words of the enactment which I have read, had they stood alone, would probably have had an immediate effect from the very day the act passed, namely the 9th of *May*. Nay, according to the old rule, which we all know prevailed some years ago, it would have had its operation from the first day of the session of Parliament. But the noble mover of this act, in order to obviate what might be, by many, deemed a hardship, introduced a clause (now the 10th section of the statute) declaring that this act should not take effect till the 1st *January* following; thereby giving all persons in possession of proof of such parol promises, seven months, and more, in which to bring their actions founded on such promises, if they should be so minded. If we were not to give the act this construction, it would follow, that if a man obtained a *verbal promise* a day or two before the first of *January*, he would still have six years, at any time within which he might bring his action. The case of *Gilmore v. Shuter*, reported in Sir *Thomas Jones* (a), was pressed upon the Court, to shew that an act of Parliament, *viz.* the statute of frauds, should not have a retrospective operation; but, upon looking at that case, and the statute to which it refers, I do not think it can govern our present decision, because the statute now under review prevents all the mis-

(a) Page 108.

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chief which the Judges in *Gilmore v. Shuter* contemplated, by giving *due* notice that this law should have no operation till the 1st of *January*, nearly eight months after its enactment. But the present decision is not the first, nor the second, that has been made upon this very statute, carrying it further than the facts of this case require us to do at present. The first I shall mention, though last in point of time, was the decision of a very profound lawyer, a very strong and clear-headed man, my much valued and excellent friend, whose early and unexpected loss to the world in his judicial capacity, the whole profession and every good man must deeply deplore, I mean the late Mr. Baron *Hullock*. At *Carlisle*, on the 5th *March* last, in a case of *Kirkhaugh v. Herbert*, he nonsuited the plaintiff, though the action had been commenced *before* the 1st of *January*, because he had only a *parol* promise to take the case out of the statute. But where can we look to a better authority upon the subject, than to the noble Lord who framed the law and brought it into Parliament? Lord *Tenterden*, at the *Sittings* after last *Hilary* Term, at *Guildhall*, nonsuited the plaintiff, where the action had been commenced before the 1st of *January*, and a *parol* promise made before that day was offered in evidence to take the case out of the statute of limitations, his Lordship holding that the statute applied, and that the *parol* promise was insufficient. In these two cases it will be observed, that the action was brought *before*, though not tried till *after* the statute had begun to operate: and therefore in that respect they are stronger than the case at bar. We are, therefore, of opinion, that in this case the rule for setting aside the nonsuit must be—

Discharged (a).

(a) See Wilkinson's "*Treatise on the Limitation of Actions*" under the above statute, page 146.

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LEGGETT, Assignee of GRIMMAN, a Bankrupt. v. FINLAY.

ALL matters in difference in this cause were, by an order of Mr. Justice *Burrough*, dated the 11th *June*, 1829, referred to a barrister, so as he should make his award in writing, on or before the first day of *Trinity* Term then next, or on or before such further or ulterior day as he should appoint and signify in writing, under his hand, to be indorsed on the said order. Several meetings took place before the arbitrator; and, by a memorandum at the foot of the order, he enlarged the time for making his award to the last day of *Trinity* Term. Before the expiration of the time so enlarged, the arbitrator recommended, that several surveyors, who had been examined before him as witnesses, should, to save expense, meet, and, if possible, agree in their valuations of certain work done for the defendant by the plaintiff; and thereupon the plaintiff's attorney, at the request of the arbitrator, on the 7th *July*, being the day previous to the expiration of the enlarged time for making the award, obtained another order of Mr. Justice *Burrough*, authorizing the arbitrator further to enlarge the time to the fourteenth day of the present Term, which order was served on the arbitrator, and was afterwards made a rule of Court. The arbitrator appointed another meeting for the 26th of *October*, of which the plaintiff had notice, but which was attended by the defendant alone, the plaintiff's attorney having informed the arbitrator that the plaintiff was absent from *London*, and that the surveyors had not met according to the proposed suggestion. The defendant having stated that he had closed his case, the arbitrator, on the 28th *October*, made his award in favour of the defendant, without having made any indorsement of the second enlargement on the original order.

—*Held*, that, as both parties had in effect assented to the enlargement, the award was valid, as the authority of the arbitrator had not expired.

By a Judge's order, all matters in difference in a cause were referred to an arbitrator, so as he should make his award in writing, on or before the first day of *Trinity* Term then next, or on or before such further or ulterior day as he should appoint and signify in writing under his hand, to be indorsed on the order. The arbitrator enlarged the time by indorsement upon the order, and, before the expiration of the enlarged time, the plaintiff's attorney, at the request of the arbitrator, obtained a Judge's order for a further enlargement. The defendant attended a meeting appointed by the arbitrator in pursuance of such order; but the plaintiff sent an excuse for his non-attendance. The arbitrator afterwards made his award, but did not indorse the second enlargement on the original order:

and the arbitrator did not make his award till after the expiration of a further period, to which it had been agreed to extend the time, in consequence of the defendant's having delayed to furnish him with the name of a trustee, which was required to make part of the award; and the defendant's solicitor afterwards wrote a letter, requiring that the arbitrator would take into consideration matters not before him during the reference,—which was refused, as the reference was considered to be closed:—the Court of *Exchequer* held, that, under those circumstances, the delay in making the award had not invalidated it, as being made after the expiration of the arbitrator's authority; for that the conduct of the defendants and the solicitor's letter, was equivalent to a consent to extend the time. So, in *Lawrence v. Hodgson* (a), that Court held, that an objection that the time for making an award had not been duly enlarged, is waived by proceeding in the reference, with a knowledge of that fact; and in *Matson v. Trower* (b), an award was held good, though made by an umpire, the arbitrators having no authority to appoint one; and though he examined the parties separately, they having attended him, and made no objection:—and here, as the plaintiff's attorney not only consented to the enlargement of the time, but actually procured the second order for that purpose, he must therefore be bound by the award.

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Mr. Serjeant *Wilde*, in support of his rule.—The only question is, whether the arbitrator had any existing authority at the time he made his award. The second order by the Judge for enlarging the time was not sufficient of itself: the arbitrator should have made an indorsement of such enlargement on the original order, before he made his award. Besides, the last order was not procured with the consent of the parties submitting, but at the request of the arbitra-

(a) 1 Younge & Jer. 10.

(b) 1 Ryan & Mood. 17.

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Mr. Serjeant *Wilde*, on a former day in this Term, viz. on the 10th instant, on an affidavit of those facts, obtained a rule on the part of the plaintiff, calling on the defendant to shew cause why the award should not be set aside, on the ground that it had not been made until after the authority of the arbitrator had expired.

Mr. Serjeant *Adams*, and Mr. Serjeant *Bompas*, now shewed cause. Neither the plaintiff nor defendant raised any objection to the enlargement of the time for making the award; and as the second Judge's order was obtained at the request of the arbitrator, and through the medium of the plaintiff's attorney, a further indorsement on the original order was unnecessary. Besides, the plaintiff did not object to the authority of the arbitrator, but the only reason assigned for his not attending the meeting on the 26th of *October*, was, that he was out of town, and that the surveyors had not met according to the recommendation of the arbitrator. The plaintiff, therefore, must be taken to have assented to the enlargement to that day, and the time for making an award may be extended by a Judge's order, particularly where the matters in difference were originally referred by virtue of such an order. In *Tidd's Practice*, it is said (a), "if arbitrators cannot make their award within the time limited by the rule of Court, or order of *Nisi Prius*, a rule may be obtained *by consent*, but not otherwise, for enlarging it; and if an arbitrator has power to enlarge the time for making his award to any other day, he may enlarge it more than once;" and in the case of *The King v. Mytton v. Hill* (b), where the defendants, in an *ex parte* application, had withdrawn their plea, and suffered judgment to be entered up, upon an agreement to submit to arbitration the question of the amount of what was due to the prosecutor, provided the award were made by a given day

(a) 9th edit. 826.

(b) 7 Price, 636.

and the arbitrator did not make his award till after the expiration of a further period, to which it had been agreed to extend the time, in consequence of the defendant's having delayed to furnish him with the name of a trustee, which was required to make part of the award; and the defendant's solicitor afterwards wrote a letter, requiring that the arbitrator would take into consideration matters not before him during the reference,—which was refused, as the reference was considered to be closed:—the Court of *Exchequer* held, that, under those circumstances, the delay in making the award had not invalidated it, as being made after the expiration of the arbitrator's authority; for that the conduct of the defendants and the solicitor's letter, was equivalent to a consent to extend the time. So, in *Lawrence v. Hodgson* (a), that Court held, that an objection that the time for making an award had not been duly enlarged, is waived by proceeding in the reference, with a knowledge of that fact; and in *Matson v. Trower* (b), an award was held good, though made by an umpire, the arbitrators having no authority to appoint one; and though he examined the parties separately, they having attended him, and made no objection:—and here, as the plaintiff's attorney not only consented to the enlargement of the time, but actually procured the second order for that purpose, he must therefore be bound by the award.

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Mr. Serjeant *Wilde*, in support of his rule.—The only question is, whether the arbitrator had any existing authority at the time he made his award. The second order by the Judge for enlarging the time was not sufficient of itself: the arbitrator should have made an indorsement of such enlargement on the original order, before he made his award. Besides, the last order was not procured with the consent of the parties submitting, but at the request of the arbitra-

(a) 1 Younge & Jer. 10.

(b) 1 Ryan & Mood. 17.

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tor. An award, to be binding on both parties, must be mutual; but here the second order could not have been binding on the defendant if the arbitrator had decided against him, as it was procured at the request of the arbitrator, and without the knowledge or consent of the defendant; and neither the plaintiff nor his attorney attended at the last meeting. This, therefore, is distinguishable from a case where a rule for enlarging the time for making an award is obtained *by consent* of the parties, as it was procured at the instance of the arbitrator himself.

Lord Chief Justice TINDAL.—I think this rule ought to be discharged. The objection raised to the award is, that the terms of the original order of reference have not been complied with, as the arbitrator was thereby only empowered to enlarge the time for making his award, by an indorsement on the order in his hand-writing. The power of the arbitrator was not limited to a single enlargement of the time, as he might extend it from day to day. But it has been said, that the second enlargement was made without authority, as there was no indorsement on the original order to warrant it. If, however, it sufficiently appears that the parties consented that a second Judge's order should be obtained to authorize a further enlargement, I think that the formal or particular mode of enlargement prescribed by the terms of the original order, is thereby waived. The only question then is, whether there is sufficient evidence to satisfy us, that there has been such consent. The plaintiff's attorney applied for and obtained the second order, at the request of the arbitrator. The plaintiff, through him, not only shewed that he was willing to act under the second order, but did not express any dissent to the arbitrator's proceeding upon it; for, when the last meeting was appointed, the excuse for his non-attendance was his being absent from town, and that the surveyors had not met according to the recommendation of

the arbitrator. But it has been said, that there was no mutuality between the submitting parties to consent to the further enlargement, and that an award, to be binding, must be mutual. To that I fully assent; but the defendant attended at the last meeting, and if the arbitrator had made an award against him, he would have been bound by it. I am therefore of opinion, that enough appears on the face of the affidavits, to shew that the consent of the plaintiff's attorney to the obtaining the second order for the enlarged time for the arbitrator's making his award, is a waiver of the objection which has been raised, that it was not duly enlarged; and therefore, that we ought not to set aside the award.

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Mr. Justice PARK.—It appears not only that the plaintiff's attorney obtained the second order for the enlargement of the time for the arbitrator to make his award, but that he had also notice of the appointment for the meeting of the 26th of *October*, as he sent an excuse for the plaintiff's not attending at that meeting. He should then have objected to the want of authority in the arbitrator to proceed with the reference; instead of which the attorney laid by till the arbitrator had made his award, and when he and the plaintiff discovered it to be against the latter, an application was made to set it aside. It appears to me, therefore, that there is no ground for the application.

Mr. Justice BURROUGH concurred.

Mr. Justice GASELEE.—I am quite satisfied that this award ought not to be set aside. I was at first disposed to think, that the last enlargement was made without authority, as the mere request of the arbitrator to have the second Judge's order for that purpose was not of itself sufficient; but enough appears to shew us, that both the

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submitting parties consented to it. The second order was procured by the plaintiff's attorney, and served on the arbitrator, and the defendant attended at the last meeting, which could only have been held in pursuance of such order. This is equivalent to a consent by both parties that the time might be enlarged according to the terms of the second order; and the arbitrator had authority to make his award, after the defendant had stated that he had closed his case, and the plaintiff sent an excuse for not attending at the last meeting. But as the plaintiff is the assignee of a bankrupt, I concur with the Court in thinking, that the rule ought to be

Discharged without costs (a).

(a) See *Mason v. Wallis*, 10 Barn. & Cress. 107.

Saturday,
Nov. 21st.

KAY v. GROVES.

The defendant gave the plaintiff the following guarantie:

—"I hereby agree to be answerable to Mr. K., (the plaintiff), for the amount of five sacks of flour, to be delivered to W. T., payable in one month." The day after the guarantie was given, the plaintiff delivered five sacks of

THIS was an action of *assumpsit* on the following written guarantie, given by the defendant to the plaintiff:—

"I hereby agree to be answerable to Mr. Kay, for the amount of five sacks of flour, to be delivered to Mr. W. Taylor, Gray's Inn Lane Road, payable in one month.

Nov. 18th, 1828.

Thomas Groves."

At the trial, before Lord Chief Justice Tindal, at Westminster, at the adjourned sittings after the last Term, the plaintiff proved, that, on the 19th November, 1828, he

flour to W. T. on account of the defendant. When part of the flour had been consumed, W. T. complained of its quality. Two days after the first delivery, five other sacks were sent to W. T. on account of the plaintiff, and three sacks and a half of the first parcel were afterwards returned to him by W. T. It being left to the Jury to say, whether the second delivery was made in substitution of the five sacks first delivered, and they having found that it was not, the Court refused to disturb the verdict or grant a new trial.

delivered five sacks of flour, on account of the defendant, to *Taylor*. It appeared, that, when part of this flour had been consumed by *Taylor*, he complained of its quality; that, on the 21st *November*, the plaintiff caused to be delivered five other sacks; and that, on the 24th, *Taylor* sent back to the plaintiff three sacks and a half of flour, being the remainder of the five sacks first delivered.

For the first parcel of flour, sent on the 19th *November*, *Taylor* gave a return ticket to the plaintiff's carman as follows:—

“Received from Mr. *Kay*, on account of Mr. *Groves*, five sacks, (*White's*).

W. Taylor.”

Taylor, also gave a return ticket for the second parcel as follows:—

“Received from *Symons's* wharf, five sacks flour (*Ball's*) on account of Mr. *Kay*.

W. Taylor.”

The defendant paid 4*l.* 5*s.* into Court, the price of the flour consumed by *Taylor*, and called a witness, who stated, that he and the plaintiff had agreed to supply *Taylor* with five sacks of flour each, at their own risk, shortly before the delivery of the flour, on the 19th of *November*.

His Lordship, after observing that the plaintiff had not proved a second order from the defendant for a further delivery of flour to *Taylor*, told the Jury, that the question for their consideration was, whether the delivery of the five sacks of flour on the 21st of *November* was made in substitution of the five sacks delivered on the 19th; and said, that although the one might have been substituted for the other, still, that the second parcel might have been delivered under a new contract, and for which the defendant would not be liable under his guarantie.

The Jury found, that the delivery of the five sacks on

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the 21st *November*, was not made in substitution of the flour delivered on the 19th; and accordingly returned a verdict for the defendant.

Mr. Serjeant *Jones*, on a former day in this Term, obtained a rule *nisi*, that this verdict might be set aside and a new trial had, on the ground that the guarantie given by the defendant was a continuing guarantie to the extent of five sacks of flour at least, although delivered at several times, and in different quantities; and that the Jury should have been directed to find a verdict for the plaintiff to that amount; and, in *Mason v. Pritchard* (a), the Court said—"That the words of a guarantie are to be taken as strongly against the party giving it, as the sense of them would admit of;" and here, the defendant meant to be answerable for the amount of five sacks of flour, to be delivered by the plaintiff to *Taylor*, if not paid for within a month of the delivery, until the credit was recalled.

Mr. Serjeant *Wilde* now shewed cause.—The defendant undertook to be answerable to the plaintiff for the amount of five sacks of flour, to be delivered to *Taylor*, payable in one month; and, as five sacks were delivered the day after the guarantie was given, *viz.* on the 19th *November*, the defendant was only responsible for the payment for those sacks, in case *Taylor* neglected to pay for them within a month from that day. The delivery of the five sacks on the 21st of *November* was certainly not made in substitution of those sent on the 19th, as, on the 24th, three sacks and a half of the first parcel were sent back by *Taylor* to the plaintiff, as being of a bad quality, and no flour was returned in lieu of it. If no part of the first five sacks had been returned, there would have

(a) 12 East, 228.

been no pretence for charging the defendant with any part of the flour sent two days afterwards; and, as there was no evidence to shew that the defendant had consented to extend his liability beyond the five sacks first delivered, it was properly left to the Jury to say, whether the second delivery was intended as a substitution of the flour first sent, and they were fully justified in finding that it was not, as three sacks and a half of the first parcel were afterwards returned to the plaintiff. Besides, *Taylor*, by his return tickets, stated that he received the first parcel of flour from the plaintiff, on account of the defendant, and the second parcel from *Symons's* wharf, on account of the plaintiff. The latter, therefore, was a separate transaction, and wholly distinct from and unconnected with the guarantie; and as *Taylor* returned to the plaintiff all the flour he had not used, which was sent to him on the 19th *November*, and the defendant paid the value of that which was consumed into Court, the Jury very properly found a verdict for him, and there is no reason to disturb it.

Mr. Serjeant *Jones*, in support of his rule.—The guarantie was a standing or continuing guarantie, and was not confined to the delivery of five specific sacks of flour, but must be taken to extend to that quantity, at whatever time and in whatever manner delivered; and if the plaintiff had caused the whole to be delivered by a sack or a bushel at a time, and at different intervals, the defendant, by his guarantie, would have been bound to pay for each sack or each bushel, at the expiration of one month from the respective deliveries, if the whole quantity did not exceed five sacks. There was no evidence to shew that the delivery on the 21st of *November* was made under a new contract; and as *Taylor* complained of the quality of the flour first delivered, the second parcel might have been

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substituted for the first, particularly as the quantities were the same; and the defendant was, at all events, liable for the payment of five sacks, as the guarantie was not limited to quality or price, or the delivery of five sacks at one and the same time; and the defendant admitted that five sacks had been supplied on the faith of the guarantie, by the payment into Court of the value of the flour which had been used by *Taylor*.

Lord Chief Justice TINDAL.—The only question in this case is, whether my direction to the Jury was right; and, as the plaintiff's demand was for so small a sum, the verdict ought not to be disturbed unless the Jury had been evidently misdirected. But after having heard the reasons adduced in support of a new trial, I am not aware that the question could have been left in any other way to the Jury than it was; and the facts, as proved, are exceedingly strong to shew that they came to a right conclusion. It was proved, that, on the 19th *November*, five sacks of flour were delivered to *Taylor* by the plaintiff, on account of the defendant, at a month's credit. The defendant's guarantie therefore began to run from the 19th, and by which he was to remain liable for the flour so delivered, if it were not paid for by *Taylor* at the expiration of a month. But it appeared that, two days afterwards, *viz.* on the 21st *November*, five other sacks were sent to *Taylor*, and the ticket left with them stated that they were sent from *Symons's* wharf, on account of the plaintiff. *Taylor*, therefore, on that day, had ten sacks of flour, for five of which the defendant was responsible, and five, for which he was not liable. On the 24th *November*, three sacks and a half of the first five sacks were returned to the plaintiff by *Taylor*, and no other flour was sent back by him in exchange. The question, therefore, under these circumstances, is, whether, although the defendant, by his

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guarantie was liable for the five sacks of flour furnished by the plaintiff on the 19th *November*, he could be deemed responsible for the five sacks supplied on the 21st, three sacks and a half of the first five having been returned. The defendant insisted, that he was only liable under his guarantie for the value of the sack and half consumed by *Taylor*, and which the defendant paid into Court. But it has been said for the plaintiff, that, as the defendant's guarantie to pay for five sacks of flour, to be delivered by the plaintiff to *Taylor*, did not state that they were to be delivered at one and the same time, it must be taken to extend to that quantity of flour to be delivered at any time; and in any parcels not exceeding five sacks in the whole, and therefore, that it applied to the second delivery of the five sacks on the 21st *November*, as well as to those delivered on the 19th. But the latter was not only an *ex post facto* delivery, but the flour was of a different sample and quality, and sent from *Symons's* wharf, and not from the plaintiff's house. I therefore left it to the Jury to say, whether the second delivery could be considered as a substitution of the five sacks that were first delivered; and they found that it was not: and they were fully warranted in so doing by the evidence of one of the witnesses, who stated, that he and the plaintiff had furnished ten sacks to *Taylor*, on their own risks; and yet the plaintiff sought to charge the defendant on his guarantie, although the second delivery of the five sacks of flour was not in exchange for or in substitution of the first.

Mr. Justice PARK.—As the plaintiff only sought to recover 17*l.* 10*s.*, being the amount of five sacks of flour, the motion to set aside the verdict can only be supported on the ground of a misdirection by my Lord Chief Justice to the Jury; and I thought, at the time of the application, that the three sacks and a half of flour were sent back by

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Taylor to the plaintiff, before the second parcel of five sacks were delivered. If that had been so, the question would have been, whether the delivery of the latter was a substitution of the former. There can be no doubt but that the first delivery, on the 19th *November*, was made in compliance with the terms of the defendant's guarantie, and he would have remained liable to the plaintiff for the amount of five sacks, to be paid for by *Taylor* in one month from that day, whether they had been delivered at once, or at different times, and if no part of the first five sacks had been returned, the defendant would have been liable for their amount. But, it appears, that, on the 21st of *November*, five other sacks were delivered by the plaintiff to *Taylor*, for which there is no colour to charge the defendant, as no part of the five sacks first delivered had been then returned, the three sacks and a half not having been sent back until the 24th, the remaining sack and a half having been consumed by *Taylor*. If he had complained of the quality of the flour contained in the first five sacks, in the first instance, or returned the three sacks and a half before the other five sacks were sent, it would have been altogether a different question.

Mr. Justice BURROUGH.—The defendant, on the 18th *November*, agreed to be answerable to the plaintiff for the amount of five sacks of flour, to be delivered to *Taylor*, payable in one month; and as five sacks were delivered on the following day, *viz.* the 19th *November*, and three sacks and a half were returned to the plaintiff after five other sacks had been supplied, the defendant cannot be deemed answerable for them, as he only stipulated for the payment of five sacks one month after delivery, and which must be taken to apply to the five sacks first delivered.

Mr. Justice GASELEE.—I am of the same opinion. If

the five sacks delivered on the 21st *November* had been sent in lieu of the first, or in substitution of the three and a half returned by *Taylor*, the case would have been altogether different. The first five sacks were delivered on the 19th *November*, and if *Taylor* had kept them twenty-seven days, and consumed part, and returned three and a half to the plaintiff, the defendant would not have been liable for flour afterwards supplied, to the extent of another month, as the credit was to be confined to one month from the time of the delivery of five sacks.

Rule discharged.

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SHERWOOD and Another v. TAYLOR.

THIS was an action brought by the plaintiffs, builders, to recover the sum of 327*l.*, the balance of an account of 3124*l.*, for work done for the defendant, who had contracted with the plaintiffs for the building of a factory in *St. George's Fields*. The defendant tendered the plaintiffs 250*l.* in cash before the commencement of the action, but the plaintiffs refused to accept it, and, nine days afterwards arrested the defendant for the alleged balance of 327*l.* The defendant, on his arrest, deposited that sum, together with 20*l.* for costs, with the Sheriff's officer; and, at the trial before Lord Chief Justice *Tindal*, at *Westminster*, at the Sittings after the last Term, the accounts appearing to be complicated;—the cause, and all matters in difference, were, by consent of the parties, referred to an arbitrator, who found that 250*l.* only was due to the plaintiffs.

Mr. Serjeant *Jones*, on an affidavit of these facts, on a former day in this Term, obtained a rule calling on the plaintiffs to shew cause why the defendant should not be

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The plaintiffs arrested the defendant for 327*l.*, the alleged balance of an account. The defendant had previously tendered 250*l.* which the plaintiffs refused to accept. The cause and all matters in difference were referred to an arbitrator, who found that 250*l.* only was due to the plaintiffs:—*Held*, that the defendant was not entitled to costs under the statute 43 *Geo.* 3, c. 46, s. 3, as he did not shew that the arrest was malicious, or that he was held to bail without reasonable or probable cause.

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allowed his costs under the statute 43 *Geo. 3*, c. 46, s. 3, on the ground that the plaintiffs had no reasonable or probable cause for arresting the defendant for the larger sum, the arbitrator having found that the sum tendered to the plaintiffs before action brought was all that was due to them.

Mr. Serjeant *Wilde* now shewed cause, and submitted that there was no pretence whatever for charging the plaintiffs with having acted maliciously, or having arrested the defendant for the alleged balance due to them without any reasonable or probable cause; and unless the defendant could maintain an action against the plaintiffs for a malicious arrest, there is no ground for this application. In *Turner v. Prince(a)*, the defendant was arrested for 100*l.*, and paid 10*l.* into Court, and, at the trial, a verdict was taken for the plaintiff, subject to an award; and it appearing before the arbitrator that there was a complicated account between the parties, he afterwards, on investigating it, directed the defendant to pay the plaintiff 20*l.* beyond the 10*l.* paid into Court; and the Court refused to allow the defendant his costs under the statute 43 *Geo. 3*, as the defendant could not, under these circumstances, sue the plaintiff for maliciously holding him to bail. Here, the defendant should have shewn that the plaintiffs had made some overcharges in the account; and the amount found to be due to them by the arbitrator is not so far short of the sum demanded and for which the defendant was arrested, as to induce the Court to assume that there was no reasonable or probable cause for the arrest. The defendant himself must have doubted as to the amount due to the plaintiffs, if not, he would have paid the sum tendered into Court, which the plaintiffs might then have

(a) 2 Moore & Payne, 305.

been induced to take out, rather than incur the expense of going down to trial.

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Mr. Serjeant Jones, in support of his rule.—The express object of the statute was to prevent arrests, where a plaintiff has no reasonable or probable cause to hold a defendant to bail for the amount of the sum alleged to be due at the time of the arrest, and, as the defendant actually tendered the precise sum found by the arbitrator to be due to the plaintiffs, they had no reasonable or probable cause for holding the defendant to bail for the larger sum. In *Dronfield v. Archer* (a), where, in an account between the plaintiff and the defendant, there were items clearly due on both sides, the Court held that it was an arrest without reasonable or probable cause within the statute, if the plaintiff arrested and held the defendant to bail for the amount due to the plaintiff, without, at the same time, giving the defendant credit for the items due on the other side of the account, for that he ought only to have held the defendant to bail for the admitted balance:—and although it was there urged that there was reasonable cause for the arrest, and that the set-off was not material, because the statute of set-off was not compulsory, and the plaintiff could not be certain whether the defendant would set off the debt due to him, yet the Court said, that the effect of the statute of set-off is to make the balance really due the debt for which the arrest ought to be made; that, although the defendant was not bound to set off the debt due to him, it was a very good reason why the plaintiff should be allowed to include in his declaration the whole sum due to him; but it was no ground for contending that a party should thus be deprived of his liberty.

Lord Chief Justice TINDAL.—I am of opinion that this

(a) 5 Barn. & Ald, 513; S. C. 1 Dow. & Ryl. 76.

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rule ought to be discharged. The statute 43 Geo. 3, c. 46, s. 3, directs, that where the plaintiff shall not recover the amount of the sum for which the defendant shall have been arrested, he shall be allowed his costs of suit, provided that it shall be made appear to the satisfaction of the Court in which the action is brought, upon motion, founded on affidavit, that the plaintiff had not any reasonable or probable cause for causing the defendant to be arrested and held to special bail in such amount. It has been contended, on the part of the defendant, that, according to the true meaning of the statute, the question is, whether, under all the circumstances, the plaintiffs had a reasonable or probable cause to hold the defendant to bail for the sum alleged to be due to them as the balance of their account; and that if it were unreasonable to arrest the defendant for that sum, he is entitled to his costs. But the construction which has been put upon the statute, and which appears to me to be consistent with the meaning of the Legislature at the time it was passed, is, that if a defendant be held to bail for *a much larger sum* than that which is ultimately found to be due to the plaintiff, the Court may be called upon to interfere and assist the defendant. But, even in that case, the labouring oar is thrown on the defendant, and he must either shew that the sum for which he was arrested was not due, or that the plaintiff had no reasonable or probable cause for holding him to bail for that amount. The main object of the statute was, that, instead of compelling the defendant to resort to an action for a malicious arrest, he might be saved the expense and inconvenience of such action, and obtain a more speedy redress by an application to the Court. Still, the proof must be the same, for the defendant must shew, to the satisfaction of the Court, upon affidavit, that he had been held to bail without any reasonable or probable cause. So, in an action for a malicious arrest, the Judge and Jury must be satisfied of that fact. Now, it

does not appear to me that the affidavit in support of this application is sufficient to shew us that the plaintiffs had no reasonable or probable cause for arresting the defendant for the sum for which he was held to bail. He does not deny that 327*l.* was due, and he actually tendered 250*l.*, so that he must have considered that sum to have been owing to the plaintiffs, at all events. Besides, he declined paying it into Court. The plaintiffs, therefore, might reasonably suppose, that he had tendered too little, and were justified in seeking to recover the whole of their demand. By the terms of the submission, all matters in difference, as well as the cause, were referred to the arbitrator. But it has been pressed on the Court, that the defendant has shewn that he was arrested without probable cause, as he had actually tendered to the plaintiffs, previously to the commencement of the action, the precise sum which was found to be due by the arbitrator. If that were so, the statute would give every defendant his costs where he had been arrested, and the plaintiff had recovered a verdict, after a tender of part of the sum alleged to be due. But the statute only meant to relieve a defendant where there was no reasonable or probable cause for arresting him for the amount for which he was held to bail. Here, for any thing that appears to the contrary, the plaintiffs might honestly have believed that the defendant was indebted to them in the sum for which they caused him to be arrested. It was the alleged balance of an account which at first amounted to 3124*l.*, and the defendant has not denied that such balance was due, but merely stated, that he tendered a lesser sum to the plaintiffs, but which they refused to accept.

Mr. Justice PARK.—The statute was kindly intended to benefit persons who might be maliciously arrested or held to bail without any reasonable or probable cause, but it has caused a source of continual litigation. The principle

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applicable to it has long been established; and I fully concur with the exposition so ably laid down by my Lord Chief Justice; and the defendant should certainly have shewn us that the plaintiffs had no reasonable or probable cause for arresting him for the sum for which he was held to bail.

Mr. Justice BURROUGH concurred (a).

Rule discharged.

(a) Mr. Justice *Gaselee* was absent, being indisposed.

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NORTHAM v. LATOUCHE.

A paper, purporting to be an order of adjudication under the stat. 7 Geo. 4, c. 57, for the discharge of an insolvent debtor is sufficient evidence of such discharge, if it be proved to have been sealed with the seal of the Insolvent Debtor's Court.

THIS was an action brought by the plaintiff, as indorsee and holder of a bill of exchange for 1000*l.*, against the defendant as the acceptor. The defendant pleaded his discharge under the Insolvent Debtor's Act, 7 Geo. 4, c. 57.

At the trial, before Lord Chief Justice *Tindal*, at *Guildhall*, at the last Sittings in this Term, the defendant, in support of his plea, gave in evidence certified copies of his petition and schedule, and produced a document, which purported to be the original order of adjudication for the discharge of the defendant, under the seal of the Insolvent Court. The Jury found a verdict for the defendant.

Mr. Serjeant *Russell* now applied for a rule *nisi* that this verdict might be set aside, and a new trial had; and submitted, that the original order of adjudication remained in the custody of the officer of the Insolvent Debtor's Court, and that it was not sufficient to prove that the seal affixed to the document produced was the seal of that Court, without also shewing that the officer

had certified that it was a true copy of the order; for the 76th section of the statute 7 *Geo.* 4, c. 57, enacts, "that the proper officer of the Court for the relief of insolvent debtors shall, on the reasonable request of any prisoner, or any of his creditors, or his or their attorney, produce and shew to such prisoner, creditor, or attorney, at such times as the Court shall direct, the petition, schedule, *order of adjudication*, and all other orders and proceedings made and had in the matter of such prisoner's petition, and all books, papers, &c., and permit him or them to inspect and examine the same; and shall provide for any such prisoner, creditor, or attorney, requiring the same, a copy or copies of such petition and schedule, or of such part thereof as shall be so required; and that a copy of such petition, schedule, *order*, and other orders and proceedings, *purporting to be signed by the officer* in whose custody the same shall be, or his deputy, *certifying the same to be a true copy* of such petition, schedule, *order*, or other proceeding, and sealed with the seal of the said Court, shall, at all times, be admitted in all Courts whatever, as sufficient evidence of the same, without any proof whatever given of the same, further than that the same is sealed with the seal of the said Court as aforesaid." Now, the document in question, which was said to be the original order of adjudication for the discharge of the defendant, could not have been so, as it was, or ought to have been, filed with the proper officer of the Insolvent Debtor's Court; and if it were a copy, it was not admissible in evidence, unless the signature of the officer were proved, or he had certified that it was a true copy of the order, as well as that it was sealed with the seal of the Court.

Lord Chief Justice TINDAL.—The document in question was produced by the clerk of the papers of the *King's Bench* prison, who stated, that he saw it sealed by the officer of the Insolvent Debtor's Court, and that the seal impressed on it was the proper seal of that Court; and it ap-

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peared, on the face of it, to be an order of adjudication for the defendant's discharge, and the plaintiff was named as a creditor in the schedule. There can be no doubt but that the defendant had duly obtained his discharge; and, with respect to the document in question, there might have been duplicate originals, in which case, the one would be equally valid as the other.

Mr. Justice PARK.—The constant practice at chambers is to produce a copy of the petition and schedule of the insolvent, and also the order of adjudication for his discharge under the seal of the Court; and I have always understood that to be sufficient to shew that he had been duly discharged, without requiring any further proof, provided that the demand from which he seeks to be relieved, as well as the name of the creditor, be inserted in the schedule.

Mr. Justice BURROUGH concurring (a)—

Rule refused.

(a) Mr. Justice Gaselee was absent.

Tuesday,
 Nov. 24th.

Sir JOHN TYRELL, Bart. v. JOHN TYRELL JENNER, sued
 with the late Archbishop of CANTERBURY.

THIS was a *quare impedit*. The defendant Jenner was a lunatic, and in confinement at a private mad-house at
 In *quare impedit*, the plaintiff sued out a writ of summons against the defendant, to which the Sheriff returned *nihil*. A writ of attachment was then issued, which recited that the defendant had been summoned to appear on the day the writ of summons was made returnable. The attachment was also returned *nihil*. The plaintiff then issued a *distringas* into Kent, (where the church was situate), with a direction to the Sheriff to return *nulla bona*. A *testatum distringas* was then issued into *Middlesex*, (where the defendant resided), by which the Sheriff was directed to levy 40s. The plaintiff afterwards entered up judgment for default of the defendant's appearance:—*Held*, that the whole of the proceedings subsequent to the writ of summons were irregular, as the attachment recited that the defendant had been summoned, when in fact he had not.

It seems, that if the defendant in *quare impedit* be a lunatic, the action is properly brought against him and not against his committee.

Hoxton, in the county of *Middlesex*, and was entitled to the advowson or right of presentation to two churches or benefices, the one in the county of *Essex*, the other at *Midley*, in *Kent*, the right of presentation to the latter of which the plaintiff claimed, and sought to obtain by this suit. On the 17th *July*, 1828, a writ of summons was sued out against the defendant *Jenner*, returnable on the morrow of *All Souls*, in *Michaelmas* Term, in that year; and on the 22nd of *August* following, a copy of the writ of summons was sent to the attorney of the committee, who had been appointed to act for the defendant *Jenner*. To this writ, the Sheriff returned *nihil*;—*non est inventus*;—and *nulla ecclesia*, there being no church in the parish. A writ of attachment, tested on the 28th day of *November*, 1828, returnable on the morrow of the *Purification*, (*February* 6th, 1829), and reciting that the defendant *Jenner* had been summoned to appear on the morrow of *All Souls*, was issued into *Kent*, to which the Sheriff returned *nihil*, and *non est inventus*. A writ of *distringas*, or grand distress, was next issued into *Kent*, tested the 6th *February*, 1829, returnable in fifteen days of *Easter*, to which the Sheriff returned *nulla bona*, he having been directed to do so by the plaintiff's attorney. A writ of *testatum distringas* was afterwards issued into *Middlesex*, tested on the 6th *May*, 1829, returnable in five weeks of *Easter*, (*May* 27th) by which the Sheriff was required to distrain the defendant *Jenner*, by all his goods, lands and chattels, and to keep them until a further writ issued, and to have his body. The plaintiff's attorney also directed the Sheriff to levy forty shillings under this writ, and to which he returned *distrinxi*. On the 29th *May*, 1829, the plaintiff's attorney served a notice in writing on the attorney of the defendant *Jenner's* committee, that in case of default of *Jenner's* appearing to the writ of *distringas* at the return thereof, the plaintiff would cause an appearance to be entered for him: and on the 26th *June* following,

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the plaintiff's attorney served another written notice on the attorney of the defendant's committee, that, in consequence of the defendant's not having appeared, judgment had been entered up, and that a writ of inquiry was about to be issued.

Mr. Serjeant *Wilde*, on an affidavit of these facts, in the last Term, obtained a rule *nisi* that this judgment might be set aside for irregularity;—on the grounds, that the defendant *Jenner* had never been served with the summons required by the statute of *Marlbridge*, 52 Hen. 3, c. 12, nor personally served with a summons to appear, according to the provisions of the statute 7 & 8 Geo. 4, c. 71, the 5th section of which enacts—"That, in all cases where the plaintiff shall proceed by original or other writ, and summons or attachment thereupon, in any action at law, against any person or persons not having privilege of Parliament, no writ of *distringas* shall issue for default of appearance, but the defendant or defendants shall be served personally with the summons or attachment, at the foot of which shall be written a notice, informing the defendant or defendants of the intent and meaning of such service," according to the form pointed out by that section. As, therefore, the defendant had not been duly summoned, the whole of the process subsequent to the original writ of summons was irregular, and the writs of *distringas* were improperly issued.

The learned Serjeant also objected, that the plaintiff should have proceeded against the committee of the defendant *Jenner*, he having been declared a lunatic previously to the commencement of this suit.

Mr. Serjeant *Stephen*, (and Mr. Serjeant *Russell* was with him), on a former day in this Term, shewed cause.—Although the defendant *Jenner* was found to be a lunatic previously to the commencement of this suit, yet his committee was not appointed or constituted until afterwards; and as

the attorney of the committee had a copy of the original writ of summons served on him, and also a notice requiring an appearance to be entered for the defendant;—as he neglected to do so, the plaintiff was entitled to sign judgment. The committee had done no act to disturb the plaintiff's right to present to the living, and the freehold remained in the lunatic, against whom the suit was properly commenced. In *Cox v. Dawson* (a), where a copyholder for life became lunatic, and A., his cousin, sowed his land, and afterwards the lord granted the custody of the lunatic to B., and A. took the corn to the use of the lunatic, and B. brought trover in his own name; the Court said, that the action should have been brought in the name of the lunatic. In *Drury v. Fitch*, the Court said (b)—“It was ruled that a lunatic should have a *quare impedit* in his own name;” and *Beverley's* case (c) is referred to; and, in *Blewitt's* case (d), it was held, that a committee of a lunatic cannot make leases, nor any way incumber the lunatic's estate, without special order of the Court. So, an action of ejectment must be brought in the name of the lunatic, for his committee is but a bailiff, and has no interest in the land; and, in *Knipe v. Palmer* (e), it was expressly decided, that a committee of a lunatic had no power to make a lease.

[The Court relieved the learned Serjeants from proceeding with the argument on this point; and called their attention to the objection raised as to the irregularity in the process, previously to the signing of judgment.]

The proceedings by the plaintiff were regular, and the defendant *Jenner* need not have been served with the summons, as in a personal action. In *Comyns's Digest* (f), it is said, that the process in *quare impedit* is summons, attachment, and distress, and, by the common law, it was

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(a) Noy's Rep. 27.

(b) Hutton, 16.

(c) 4 Rep. 123.

(d) Ley, 47.

(e) 2 Wils. 130.

(f) Tit. “Pleader,” (3 l. 1.)

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distress infinite. But now, by the statute of *Marlbridge*, 52 Hen. 3, c. 12, if the defendant does not appear, nor cast an essoin on the first distress, or before, there shall be judgment for the plaintiff, and a writ to the bishop, though, upon the summons or *pone*, the defendant was not summoned, but *nihil* returned. Although, according to *Brownlow* (a), and the case of *Searle v. Long* (b), it appears that the summons must be served on the defendant personally, or at the church door, for that where the process is so fatal, the party ought to be duly served; yet, in *Viner's Abridgment*, tit. "*Summons* (c)," it is said—"In *quare impedit*, it shall not be to the person;" and 11 Hen. 6, 4, is referred to, and the same authority is cited in *Rolle's Abridgment* (d). Here, the Sheriff made a threefold return to the writ of summons, one of which was *non est inventus*, and which was a true and proper return, as the defendant *Jenner* was continually residing in *Middlesex*, and it would have been irregular to have served him at *Hoxton*, before a *testatum distringas* had been issued upon the *distringas* into *Kent*. Besides, the defendant had not only no place of residence in *Kent*, but there was no church in the parish, to the door of which the summons could be affixed, nor could the Sheriff make proclamation, or go to the church to seize the profits. The statute 52 Hen. 3, c. 12, enacts "that, in a plea of *quare impedit*, if the disturber come not at the first day that he is summoned, nor cast no essoin, then he shall be attached at another day; at which day if he come not, nor cast no essoin, he shall be distrained by the great distress given by that statute; and if he come not then,—by his default a writ shall go to the bishop of the same place, that the claim of the disturber for that time shall not be prejudicial to the plaintiff; saving to the disturber his right at another time, when he will sue therefore." And Lord

(a) Vol. 1, p. 158.

(b) 2 Mod. 265.

(c) A. pl. 1.

(d) Vol. 2, page 486.

Coke, in his reading upon this statute, and commenting on the words—" *summonitus fuerit*," says (a)—" Put the case, that, upon the summons, the defendant is returned *nihil*, and, at the attachment and distress, *nihil* also, this case is out of the letter of the statute, for the defendant was never summoned, but, it is said, that when there be two mischiefs at the common law, and the lesser is provided for by express words, the greater shall be included within the same remedy. This case when *nihil* is returned, is the greater mischief, for he, by his default, shall lose nothing, but, in the case provided, the defendant, by his default, shall lose issues, and the law intends that he will rather appear than lose issues." Lord *Coke* therefore considers that the statute applies to a case where *nihil*s are returned according to the fact, as here, as well as to a case where the defendant has been summoned; and in this case the writ of summons was not only returned *nihil*, but *non est inventus* also, upon which the attachment was regularly sued out, and which was also properly returned *nihil*; and the Sheriff having levied under the *testatum distringas*, the plaintiff was entitled to sign judgment for want of the defendant's appearance. Although his committee had notice that the plaintiff would cause an appearance to be entered for the defendant in case he neglected to do so; yet it was unnecessary, and ought not to prejudice the plaintiff, as it was clearly given by mistake, under the statute 7 & 8 *Geo.* 4, c. 71, which only applies to personal actions, as its object was to regulate the practice of arrests upon mesne process; and, in *Everett v. Wharton* (b), where, upon process by original writ against a member of Parliament, the notice at the foot of the summons stated, that, in default of the defendant's appearance on the return day of the writ, the plaintiffs would cause an appearance to be entered for him;—it was held not to be a sufficient ground

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(a) 2nd Instit. 124.

(b) 5 Mau. & Selw. 321.

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of objection to make the process void. Although, there; the process was sued out in a personal action, yet the notice in this case could not affect the defendant or his committee, as he was already in default, nor could it vitiate the former proceedings; and the case of *Bloxam v. Surtees* (a), is an authority to shew that the *testatum distringas* into *Middlesex*, was regularly issued. There, after a summons and *distringas* issued against a privileged defendant in the county where the action was brought, but in which he did not reside, and of which process he had no notice, and *non est inventus* and *nulla bona* were returned; it was held that a *testatum distringas* might regularly issue into the county in which he resided, and had property, without any new summons in such county. Lastly, the Sheriff returned *nulla ecclesia* to the writ of summons; and, in *Viner's Abridgment* (b), in treating upon the statute 31 *Elizabeth*, c. 3, s. 2, for the avoiding of secret summons in real actions, which ordains that proclamation of the summons shall be made on a *Sunday*, at or near to the most usual door of the church or chapel, or the town or parish whereupon the summons was made, it is said in the notes—"But if there be no church in the parish, the summons by the common law is sufficient; for, it was not the intent to have summons at the church, where there is no church;" and *Anderson* (c) is referred to as an authority; and here, it appears, that there was no church in the parish, at the door of which proclamation could be made.

Mr. Serjeant *Wilde*, and Mr. Serjeant *Adams*, in support of the rule.—This being a proceeding in *quare impedit*, which is a mixed action, it was incumbent on the plaintiff to proceed in the course pointed out by law, and the process should be regularly sued out, and duly exe-

(a) 4 East, 162.

(b) Tit. "Summons," (C. 3.)

(c) Page 278, pl. 286.

cuted as required by the statute of *Marlbridge*, viz. by the great distress; but here, the plaintiff gave notice to the defendant's committee, that he should cause an appearance to be entered for the defendant, in case he made default. The case of *Searle v. Long* (a) appears to be expressly in point. There, in *quare impedit* against two defendants, they appeared to the summons and cast an essoin. Afterwards, an attachment issued for their not appearing at the day, and so process continued to the great distress, which being returned, and no appearance, judgment final was ordered to be entered according to the statute of *Marlbridge*, and as the defendants had not been summoned, either upon the attachment or the great distress, the Court set aside the judgment, and said—"The design of the statute of *Marlbridge* was, to have process duly executed, which, if it were executed as the law requires, the tenant could not possibly but have notice of it. For, if he do not appear upon the summons, an attachment goes out; that is, a command to the Sheriff to seize his body, and make him give sureties for his appearance: if yet he will not appear, then the *great distress* is awarded, that is, the Sheriff is commanded to seize the thing in question: if he come not in for all this, then *judgment final* is to be given. Now, the issue of this process being so fatal, that the right of the party is concluded by it, we ought not to suffer this process to be changed into a thing of course. It is true, the defendant here had notice of the suit, but he had not such notice as the law allows him; and for his fourching an essoin, the law allows it him." Here, the plaintiff's attorney, instead of directing *nulla bona* to be returned to the *distringas* issued into *Kent*, should have ordered the Sheriff to have taken the profits of the living under the great distress; and as he did not pursue that course, the judgment was improperly signed, as no part of the pro-

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(a) 1 Mod. 248.

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cess subsequent to the writ of summons was duly executed according to the provisions of the statute of *Marlbridge*. At all events, the writ of attachment was irregular, as it recited that the defendant *Jenner* had been summoned to appear; whereas, the Sheriff had returned *nihil* and *non est inventus* to the writ of summons, and the plaintiff's attorney merely directed the Sheriff to levy forty shillings under the *testatum distringas* into *Middlesex*, which was a mere nominal issue, and not made in pursuance of the great distress.

Mr. Serjeant *Russell* observed, that, in the case of *Searle v. Long*, the sureties returned upon the summons were *John Doe* and *Richard Roe*, and the defendant produced an affidavit, which stated that he had not been summoned, that he had not put in any sureties, and that he did not know any such persons as *John Doe* and *Richard Roe*. Here, however, the defendant could not have been summoned in *Kent*, as he had no place of residence there, but, on the contrary, was confined at a lunatic asylum in *Middlesex*.

Cur. adv. vult.

Lord Chief Justice TINDAL now delivered the judgment of the Court, as follows:—

This was a motion for setting aside a judgment which has been signed for the plaintiff in *quare impedit*, upon the ground of irregularity; and the irregularity complained of is, that the defendant was never served with the summons, and that no part of the subsequent process has been duly executed.

The process upon a *quare impedit* is given by the statute of *Marlbridge*, 52 Hen. 3, c. 12, in the terms following:—"And, in a plea of *quare impedit*, if the disturber comes not at the first day that he is summoned, nor cast no essoyn, then he shall be attached at another day, at which

day, if he come not, nor cast no essoin, then he shall be distrained by the great distress above given; and if he come not then, by his default a writ shall go to the Bishop of the same place, that the claim of the disturber for that time shall not be prejudicial to the plaintiff," &c.

The form of this writ of grand distress appears in the *Second Institute* (a) in Lord Coke's reading on the statute of *Westminster* 1st, where he observes, somewhat quaintly—"Grand distress—*districtio magna*, is so called, not for the *quantity*, for it is very short, but for the quality, for the extent is very great, for thereby the Sheriff is commanded, "*quod distringat tenentem ita quod ipse, nec aliquis per ipsum ad ea manum apponat, donec habuerit aliud præceptum, et quod de exitibus eorundem nobis respondeat, et quod habeat corpus ejus, &c.*"

Whilst, therefore, the statute, by substituting the process by grand distress, and a peremptory judgment on default of appearance, instead of the ancient process of distress infinite, which only went to compel appearance, but gave the plaintiff no judgment, did, on the one hand, materially benefit the plaintiff, "the distress infinite being mischievous," as Lord Coke says, "in respect of the lapse;" it cannot but be seen, that it intended on the other hand, to secure to the defendant legal notice of the action, by the due execution of the substituted writ.

Even in personal actions, no judgment could be signed against the defendant for default of appearance, at common law; and the statute 12 *Geo.* 1, which enables the plaintiff to appear for him, in order to proceed to judgment, expressly provides, that there shall first be an affidavit of the service of the process. If, then, such proof of notice was necessary in personal actions, before a judgment by default was allowed, we may safely infer that the statute of *Marlbridge* contemplated an equal certainty of notice, and intended that the grand distress should be a writ ac-

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tually executed according to its purport and directions; and accordingly, in the case of *Searle v. Long* (a), where the defendant had appeared once on the summons, and cast an essoin, but afterwards had neither been summoned on the attachment nor the great distress, but nominal summonses had been returned on the process, the Court set aside a judgment by default, on the ground that the process had not been executed as the statute intended; observing, that the issue of that process is so fatal, that the right of the party is concluded by it, and that they ought not to suffer it to be changed to a thing of course.

Now, the process which has been sued out in the present case, is a summons, an attachment, a process of grand distress into *Kent*, and a *testatum* grand distress into *Middlesex*. The summons is returned *nihil*, and admitting, according to the doctrine cited from the *Second Institute*, that an attachment may, nevertheless, be grounded thereon, the attachment should at least make a true recital of the return of the summons; whereas, in this case, after the return of *nihil* has appeared upon the record, the attachment recites, that the defendant had been summoned to appear on the morrow of *All Souls*. This alone would be a sufficient irregularity in a process of this description, to call upon us to set it aside. The attachment is then returned *nihil*; and the grand distress, although it is sued out in the usual form, is so far from being intended as any real proceeding, that the plaintiff's attorney himself treats it as a mere matter of form, and by his direction the Sheriff makes the return of *nulla bona* thereon; and the *testatum*, by which the Sheriff is required to distrain the defendant by all his goods, lands, and chattels, and to keep them until a further writ issues, and to have his body, &c., is thought to be satisfied by a return, that the Sheriff has distrained him by issues merely nominal. Indeed, the plaintiff's attorney treats this

(a) 1 Mod. 248.

second writ as merely formal, as he only directs the Sheriff to levy forty shillings thereon.

We think, therefore, that the process of the Court has neither been regularly issued nor properly executed, and although the defendant's legal advisers had knowledge of the proceedings, as they had in the case above referred to, yet, they never had that legal notice which the statute of *Marlbridge* intended, when it substituted for the dilatory process of distress infinite, the speedy and effectual process of the grand distress and final judgment in default of appearance. For these reasons, we think that the rule ought to be made—

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FIELDER v. RAY.

Tuesday,
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THIS was an action of *assumpsit* for work and labour done and performed by the plaintiff, in printing certain calico and cotton goods for the defendant.

At the trial, before Lord Chief Justice *Tindal*, at *Guildhall*, at the Sittings after the last Term, it appeared, that a person of the name of *Aldrich* had carried on the business of a calico printer at *Wandsworth*, and that the defendant had employed him to print certain quantities of calico, on terms agreed upon between them. That, shortly afterwards, and whilst the work was in progress, the calicoes having been merely prepared for printing, *Aldrich* assigned his business and factory to the plaintiff, who, on taking possession, sent a circular letter to the persons who had been in the habit of employing *Aldrich*, informing them that he (the plaintiff) had taken the lease of the factory, and that he intended to carry on the business in future.

In an action for work and labour, after the plaintiff had closed his case, the defendant called a witness, who stated that there had been a contract in writing between the plaintiff and defendant, which the latter produced, but, it not being stamped, the Judge refused to receive it in evidence:—*Held*, that it was properly rejected; but the Court granted a new trial on payment of costs, in order that the defendant might have

an opportunity of producing the instrument duly stamped.

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The plaintiff proved that the greater part of the calicoes sent by the defendant to *Aldrich* were printed by the plaintiff after he had succeeded to the premises, and that when they were finished, he caused them to be delivered to the defendant.

The plaintiff's agent proved, that, in a conversation between him and the defendant, shortly after the plaintiff took possession of the premises, certain terms were agreed upon, by which the calicoes were to be finished, they having been only prepared for printing by *Aldrich*, at the time of the assignment to the plaintiff.

It was insisted for the defendant, that his contract was with *Aldrich*, and not with the plaintiff, whom he had never retained, and that, at all events, the defendant could only be liable for the work done by the plaintiff after the assignment by *Aldrich*; and a witness was called, who stated that the defendant had refused to allow the work to be proceeded with by the plaintiff, until he had signed a written memorandum or agreement, containing the terms on which the printing of the calicoes was to be completed. The agreement was then produced, but, as it was not stamped, it was objected, on the part of the plaintiff, that it could not be read; and the Lord Chief Justice being of opinion that the objection was well founded, refused to receive the instrument in evidence, and the Jury found a verdict for the plaintiff, for the amount of his demand.

Mr. Serjeant *Wilde*, on a former day in this Term, obtained a rule *nisi*, that this verdict might be set aside, and a new trial had, or a nonsuit entered, on the grounds, that as there appeared to have been a written agreement between the plaintiff and the defendant, as to the terms on which the calicoes were to be printed, the plaintiff should either have required its production, or declared upon it; and that, without it, there was no evidence of a contract to go to the

Jury; and as the agreement was produced by the defendant, and appeared to be in writing, the plaintiff ought to have been nonsuited; for, in *Vincent v. Cole* (a), it being shewn in an action for work and labour, that the work was commenced under a written agreement, Lord *Tenterden* was of opinion that the plaintiff could not proceed without producing it, and directed a nonsuit; and, on its being proposed by counsel that his Lordship should look into the agreement, which was in Court unstamped, to see whether or not it comprehended the item sought to be recovered, he, on a motion afterwards made *in banc* to set aside the nonsuit, observed, that the inconvenience of such a course would be very great, as it might impose upon a Judge the necessity of repeatedly looking through a long agreement, to see whether it contained provisions applicable in any degree to fifty or sixty items, which a party claimed to recover independently of it. So, here, as it was shewn, that the plaintiff's claim on the defendant arose out of a contract which had been reduced into writing, he should either have produced it himself, or called on the defendant to do so, and not have induced the Judge who presided at the trial, to suppose that there was only a verbal contract between the parties, according to which the work was to be performed.

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Mr. Serjeant *Taddy* now shewed cause.—The instrument in question, having been produced by the defendant after the plaintiff had closed his case, it was properly rejected for want of a stamp; and, even if it had been looked at, it might not relate to the contract on which the action was brought, or refer to the terms on which the calicoes were to be printed and completed for the defendant. The case of *Vincent v. Cole* is altogether distinguishable from the

(a) 1 Mood. & Malk. 257; S. C. 3 Car. & Payne, 481.

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present, as there, the plaintiff called the defendant's surveyor, who stated, on cross examination, that the work had commenced under a written agreement. The plaintiff, therefore, might, and ought to have produced it, but here he had established his case without any reference having been made to the agreement; for he proved that the work was done, as well as the price the defendant had agreed to pay for printing the calicoes, and that, when they were finished, they were delivered to the defendant. In *Reed v. Deere*, Mr. Justice *Littledale* said (a)—“If, indeed, a plaintiff gets through his case, without giving the defendant any opportunity of mentioning the written agreement, the latter must produce it, and he cannot avail himself of it, unless it be duly stamped.”—And in the late case of *The King v. The Inhabitants of Rawden* (b), upon the trial of an appeal, the appellant having proved that the pauper occupied a tenement of 10*l. per annum*, and paid rent and taxes for the same;—the respondents, in order to shew that the pauper was not the sole tenant, attempted to prove by parol, that the premises were let to the pauper and two other persons; but the witness, on cross-examination, having stated that the letting was by a written instrument, the Court held that it could be proved only by the production of that instrument.

Mr. Serjeant *Wilde*, in support of his rule.—As to that part of the work which was done for the defendant under his contract with *Aldrich*, it is quite clear, that the plaintiff is not entitled to recover; and as the printing of the cottons was completed under a written contract between the plaintiff and defendant, which was in the possession of the latter, he was bound to produce it. The plaintiff should have required its production; and as there was an express contract,

(a) 7 Barn. & Cress. 266.

(b) 8 Barn. & Cress. 708.

the plaintiff could not recover, as, if the work were done under a general contract, and without the written instrument, there was no evidence of a contract to go to the Jury; and if the plaintiff had proved his case by a witness, whom the defendant had afterwards shewn to have been interested, his testimony could not avail. Although the plaintiff had proved his case, yet, as the defendant shewed that there was a contract in writing, it is immaterial whether it appeared on the cross-examination of one of the plaintiff's witnesses, or in the evidence adduced for the defendant. In *Reed v. Deere*, the plaintiff declared upon two written agreements, by the second of which, variations were made in the first, and there were also counts upon each separately; and it appeared, when both the instruments were produced in evidence by the plaintiff, that the first only was stamped; and it was held, that the second could not be read in evidence to support the plaintiff's case, but that it might be looked at, in order to ascertain whether the first was altered by it; and that, therefore, the plaintiff could not exclude the second agreement, and proceed upon the count setting out the first only. That case is altogether distinguishable from the present, and Mr. Justice *Holroyd* there said^(a)—"It has been urged, that the new agreement could not be received in evidence at all, either for or against the plaintiff. But, although, under such circumstances, the Court cannot notice the particulars of the agreement, it may take notice that an agreement has been made relating to the subject matter of the action. It is every day's practice, when a witness gives parol evidence of a contract, to ask whether it was reduced into writing? If he says it was, the Court must take notice of the existence of that writing, and require it to be produced." So, here, when the defendant's witness said, that there was an agreement in writing, the Court was bound to take notice of its existence, as it was actually produced by the defendant, although it was not stamped. The case of *The King v.*

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(a) 7 Barn. & Cress. 265.

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The Inhabitants of *Rawden* was decided upon an appeal against an order of Justices for the removal of a pauper and his family; and the respondents relied upon a different contract than that proved by the appellant; and Mr. Justice *Bayley* said (a)—“There can be no doubt that a party may, by keeping out of view a written instrument, make out by parol testimony a *prima facie* case of tenancy, and that it then lies on the opposite party to rebut the *prima facie* case so made out.” This the present defendant did, when he proved that there was an agreement in writing, and it is immaterial in what stage of the cause it was produced; and the case of *Vincent v. Cole* is expressly in point, to shew, that when the defendant proved that the work was done by the plaintiff under a written contract, the contract should have been looked at, in order to see whether or not it applied to the subject matter of the action.

Lord Chief Justice TINDAL.—An application has been made for a new trial in this case, on two grounds—*first*, that there was no evidence of a contract between the plaintiff and the defendant, or, at all events, not sufficient evidence of a contract to go to the Jury—and *secondly*, that a written document which was tendered in evidence on the part of the defendant, but which was rejected for want of a stamp, should have been received, in order to shew that the plaintiff had agreed in writing to do the work on certain terms, which differed from those the plaintiff had proved, and would therefore have been a ground for a nonsuit. With respect to the first objection, the agent of the plaintiff proved a conversation between himself and the defendant, before the execution of the memorandum or agreement in question, as to the terms on which certain calicoes were to be printed, which were sent to the factory whilst it was in the occupation of *Aldrich*. It appeared, that the plaintiff took possession in *January*, 1828, when he issued a circular letter to each of

(a) 8 Barn. & Cress. 710.

Aldrich's employers; and the witness stated, that, shortly afterwards, the conversation took place as to the prices to be charged, and the terms on which the defendant's calicoes were to be printed. They were sent to *Aldrich* whilst he occupied the premises, and the greater part of them were finished by the plaintiff; for it appeared that only the charge of threepence *per* piece was incurred for preparing the calicoes during the time *Aldrich* occupied the premises, but that five shillings *per* piece was payable to the plaintiff for the work done by him after he took possession. I was therefore of opinion, that, although there might have been a previous contract between the defendant and *Aldrich* as to the price for which the calicoes were to be printed, still, as there was some evidence of a subsequent contract with the plaintiff, it was a question for the Jury, to say whether such contract existed or not; and as the plaintiff proved the delivery of the goods to the defendant, after the work was completed, I think they were warranted in finding in the affirmative.

With respect to the second objection:—after the plaintiff had closed his case, the defendant proved, by one of his witnesses, that there was a contract in writing between him and the plaintiff as to the terms on which the work was to be done. Upon which, the defendant's counsel insisted that he had a right to stop there, and that, having proved that there was a written contract, the plaintiff ought to have produced it. On the best consideration I have been able to give this point, I think that the defendant was, in that stage of the cause, bound to prove the existence of the agreement, by producing it properly stamped, and, as he failed to do so, I thought it could not be received in evidence. But, it has been said, that, if it be shewn that a contract is in writing, it makes no difference whether its existence be proved on the cross-examination of the plaintiff's witnesses, or on the examination in chief of those of the defendant. But if, on the testimo-

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ny of one of the plaintiff's witnesses, it should have appeared that there was an instrument or contract in writing as to the terms on which the work was to be done, the plaintiff might either shew that it had not been acceded to on his part, or that it had been put an end to. But if the defendant attempt to prove the existence of such contract by the testimony of one of his witnesses, such contract must be substantiated by the production of the agreement in the regular way; and, if its existence were shewn on the cross-examination of one of the plaintiff's witnesses, it could not be receivable in evidence unless it were duly stamped; if not, this inconvenience might follow, *viz.* that on one of the defendant's witnesses merely stating that there was a contract in writing, the plaintiff must be nonsuited unless it were produced, although it might be inconsistent with the terms of his original demand, or, if read, might be found not to apply to the contract which the plaintiff sought to enforce. What was said by Mr. Justice *Littledale*, in *Reed v. Deere*, appears to me to be precisely in point, and although he observed (a)—“ That the Court may, in all cases, so far allow parol evidence of a written agreement as to ascertain that it relates to the subject matter in discussion;” yet it was subject to this qualification—“ for if,” said that learned Judge, “ a plaintiff gets through his case, without giving the defendant any opportunity of mentioning the written agreement, the latter must produce it, and he cannot avail himself of it, unless it be duly stamped.” In the case of *The King v. The Inhabitants of Rawden* (b), the respondents' witness, on cross-examination, having stated that certain premises were let to a pauper under a written instrument, the Court most properly held, that the terms of the letting could only be proved by the production of that instrument. But this very point appears to me to have been decided in this Court, in the case of *Stevens v. Pinney* (c),

(a) 7 Barn. & Cress. 266.

(b) 8 Barn. & Cress. 266.

(c) 2 B. Moore, 349.

where, in an action for work and labour, the plaintiff having proved the value of the work done, and closed his case, one of the defendant's witnesses swore that there was a memorandum in writing, containing an estimate at which the work was to be performed, and produced a copy in the plaintiff's hand-writing, unstamped, and not signed either by him or the defendant; and it was held, that the plaintiff was not thereby precluded from recovering on the common counts, as it did not appear whether the original memorandum was in existence, and the defendant had given no notice to produce it; or that, at all events, the testimony should have come from one of the plaintiff's witnesses, on cross-examination. That case, therefore, agrees with this, both in substance and in fact, and we cannot say, judicially, whether there was such a memorandum in existence as the defendant's witness alluded to, unless we were entitled to look at it, and which I could not do at the trial, as it did not appear to have been stamped. But, as I now think that the instrument, if produced, may have some bearing on the merits of the case, the defendant ought to have a new trial on payment of costs, when he may have an opportunity of putting in the agreement properly stamped.

Mr. Justice PARK.—I agree with my Lord Chief Justice, that the defendant ought to have a new trial on payment of costs. With respect to the *first* ground, I concur with him in thinking that there was sufficient evidence of a contract between the plaintiff and defendant as to the terms on which the work was to be done, to go to the Jury, and I very much doubt, whether, in the conversation alluded to, there was a renunciation of the previous terms between the defendant and *Aldrich*, or any new stipulation entered into, as to the price to be paid to the plaintiff for finishing the calicoes which were begun by *Aldrich* before the plaintiff took possession of the premises. *Secondly*,

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with respect to the rejection of the instrument or agreement in question, which was in writing, and produced by the defendant, all the authorities on this subject were fully considered, and the previous decisions investigated, in the late case of *Strother v. Barr* (a); and, although its circumstances do not apply to the present, yet it appears to me to be an authority to shew, that no case or decision is contradictory to what has been just stated by my Lord Chief Justice; and I think that he most properly refused to receive the instrument in evidence at the trial, as it was not stamped. The case of *Vincent v. Cole* is perfectly consistent with this. That was an action for work and labour, and a surveyor, who was called for the plaintiff to prove that the work had been done, stated, that a written agreement had been drawn up and signed by the parties. The agreement was produced, but it was not stamped, and, on its being insisted for the defendant, that, as the agreement was not stamped, it could not be read, Lord *Tenterden* excluded it, and directed a nonsuit, which the Court afterwards refused to set aside. His Lordship observed at the trial (b), that he had always (perhaps more so than other Judges) acted most strictly on the rule, that what is in writing shall only be proved by the writing itself; that his experience had taught him the extreme danger of relying on the recollection of witnesses, however honest, as to the contents of written instruments, and that they might be so easily mistaken that the purposes of justice required the strict enforcement of the rule;" and, in *Strother v. Barr*, I am reported to have said (c)—"that parol evidence of the contents of a written instrument cannot be given, where the contract contained in such instrument is the subject of the suit; because *the terms* of the agreement must depend on the written instrument;" and I referred to the case of

(a) 2 Moore & Payne, 207.

(b) See 1 Mood. & Malk. 258.

(c) 2 Moore & Payne, 216.

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Doe d. Wood v. Morris (a), where, in ejectment, the landlord having proved payment of rent by the defendant, and half a year's notice to quit given to him, it was held, that the plaintiff could not be turned round by his witness proving, on cross-examination, that an agreement relative to the land in question, the contents of which the witness did not know, was produced at a former trial between the same parties, and was, on the morning of the trial, seen in the hands of the plaintiff's attorney, no notice having been given by the defendant to produce that paper; for, though it might be an agreement relative to the land, it might not affect the subject matter of the action, nor even have been made between those parties. That case is far stronger than the present, as there the fact came out on the cross-examination of one of the plaintiff's witnesses. But the case of *Stevens v. Pinney* appears to me to be precisely in point; and Mr. Justice *Dallas*, (in the absence of Lord Chief Justice *Gibbs*), in a most elaborate judgment said (b)—“ It is quite clear, that if it had appeared at the trial, as part of the plaintiff's case, that there was an agreement in writing, regulating the price, and the terms on which the work was to be performed, he must have produced it in evidence, and that, if it were not duly stamped, he must have been nonsuited, because, otherwise, it would have been unavailable, and could not be given in evidence for him. He did not think proper, however, to resort to this, but founded his claim on a *quantum meruit*. The distinction in this case is, that the plaintiff had proved his case to the value of the work done; after which, one of the defendant's witnesses proved, that, originally, there was a written agreement between the parties, which, on production, turned out not to be stamped. If this had been produced by the plaintiff, it could not be given in evidence, because the want of a stamp would render it a nullity.”

(a) 12 East, 237.

(b) 2 B. Moore, 352.

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So, what was said by Mr. Justice *Littledale*, in the case of *Reed v. Deere*, appears to me to be conclusive of the question, *viz.* “that if a plaintiff gets through his case, without giving the defendant any opportunity of mentioning the written agreement, the latter must produce it, and he cannot avail himself of it, unless it be duly stamped;” and in the subsequent case of *The King v. The Inhabitants of Rawden*, Mr. Justice *Bayley* said (a)—“A *prima facie* case was made out by the appellants. The respondents attempted to vary that case by proving that in fact the premises were let to the pauper jointly with two others; but that letting was by a written instrument. It is quite clear, that it could be proved only by the production of the written instrument.” As, therefore, in this case, it did not appear that there was any written agreement between the parties, before the plaintiff had closed his case, and the instrument was produced by the defendant, it was properly rejected by my Lord Chief Justice, as it was not stamped, and it was consequently not available to the defendant.

Mr. Justice BURROUGH.—With respect to the first point, I am clearly of opinion, that there was sufficient evidence of a contract between the plaintiff and the defendant to go to the Jury. *Secondly*, as the instrument in question was produced by the defendant, after the plaintiff had closed his case, it ought to have been stamped; and if the defendant’s counsel had been aware that there was an agreement in writing when the plaintiff opened his case, he would, in all probability, have cross-examined the plaintiff’s witnesses as to whether there had been such an agreement or not. It is entirely the fault of the defendant or his attorney that the instrument was not stamped; and I entirely agree with what fell from Mr. Justice *Littledale* and Mr. Justice *Bayley*, in the late cases of *Reed v. Deere*,

(a) 8 Barn. & Cress 710.

and *The King v. The Inhabitants of Rawden*, and which has established a true and sound principle. But as the Court think, that the defendant ought to have an opportunity of producing the agreement when stamped, the rule for a new trial must be made absolute on payment of costs.

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Mr. Justice GASELEE was absent.

Rule absolute accordingly.

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THIS was an action of replevin. The plaintiff signed interlocutory judgment against the defendant for want of an avowry; and, on the 28th of *April* last, the plaintiff's attorney delivered to the defendant his bill of costs, amounting to 28*l.* 7*s.* 8*d.*; and, on the 29th, the defendant was arrested by another creditor, and committed to the *Fleet* Prison, where he remained until the 16th of *June*, on which day he obtained his discharge under the Insolvent Debtor's Act, (7 *Geo.* 4, c. 57). The plaintiff's name was inserted in the defendant's schedule as a creditor, to the amount of the bill of costs delivered by the attorney, and of which the plaintiff had notice. The defendant also served the plaintiff with a copy of the order for his discharge. But, on the 10th *October*, the plaintiff served the defendant with notice of a writ of inquiry to assess the damages in this action; and, on the 14th instant, sued out a writ of *feri facias* for the amount of those damages, on the defendant's goods, under which the Sheriff took, among other

In replevin, the plaintiff signed interlocutory judgment against the defendant for want of an avowry, and the plaintiff's attorney delivered his bill of costs. The defendant was afterwards arrested by another creditor, and obtained his discharge under the Insolvent Debtor's Act, 7 *Geo.* 4, c. 57, having inserted the amount of the attorney's bill in his schedule. After the defendant's discharge, the plaintiff executed a writ of inquiry, and sued out a *feri facias*

for the amount of the damages in the replevin suit:—*Held*, that the execution was regular, as the words, *debt or sum of money*, in the 61st section of the statute, are limited to debts due from the insolvent to his creditors at the time of his first imprisonment, and do not apply to unascertained or unliquidated damages.

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things, his wearing apparel and other articles excepted by the Insolvent Debtor's Act.

Mr. Serjeant *Merevether*, on an affidavit of those facts, obtained a rule *nisi*, that this writ might be set aside, and that the defendant's goods, which had been levied thereunder, might be restored to him, on the ground that the execution was irregular, as it was sued out after the defendant's discharge under the Insolvent Debtor's Act, 7 Geo. 4, c. 57, the 61st section of which enacts—"That, after any person shall have become entitled to the benefit of the act, by any adjudication as therein provided, no writ of *fiери facias* shall issue on any judgment obtained against a prisoner, for any debt or sum of money, with respect to which such person shall have so become entitled, nor in any action upon any new contract or security for payment thereof, except upon the judgment entered up against such prisoner according to the act."

Mr. Serjeant *Wilde* now shewed cause.—The statute 7 Geo. 4, c. 57, under which the defendant obtained his discharge, only discharged him from those debts which were due at the time of his first imprisonment, and the plaintiff had then only signed interlocutory judgment against the defendant in a replevin suit for want of an avowry. He was, therefore, not liable to the plaintiff for an ascertained debt, but only for unliquidated damages; and as the amount could not then be ascertained, it could not be specified in the schedule; and the defendant only inserted the amount of the plaintiff's attorney's bill of costs, but the damages the plaintiff might eventually recover in the suit, were unliquidated at the time the defendant was committed to prison. In *Hilton v. Worrall* (a), a debt depend-

(a) 2 Chit. Rep. 448.

ing upon a contingency at the time of a party's discharge under the Insolvent Act, 18 *Geo.* 3, c. 52, was held not to be discharged thereby;—and the principle of that decision is applicable to all subsequent statutes which have been passed for the relief of insolvent debtors; and, in *Lloyd v. Neale*(a), where a party was discharged under the statute 53 *Geo.* 3, c. 102, it was decided to be no bar to an action of trespass, where the cause of action arose before the insolvent went to prison, and the damages were unliquidated at the time of his discharge; and Lord Chief Justice *Abbott* said—“A man who has a right to bring an action of trespass before the insolvent goes to prison, is not a creditor within the meaning of the act of Parliament:” and Mr. Justice *Bayley* said—“The plaintiff does not claim to be a creditor, but he claims damages for a wrong done, which are not liquidated before the defendant goes to prison. Suppose this had been an action for an assault, could it be said, because the plaintiff laid his damages at a specific sum, that he would therefore be a creditor within the meaning of the statute? So, in *Lloyd v. Peel*(b), a plea of a discharge under the 53 *Geo.* 3, was held to be no bar to an action of trespass for mesne profits, even though accruing before the discharge; for the Court said—“The Insolvent Act only discharges the debtor from the debts due by him to those who are, or who claim to be, his creditors at the time of his discharge; but, here, the plaintiff was neither the one nor the other at the time of the discharge, for he only claimed damages for a wrong done to him. Those damages do not constitute a debt till judgment for them has been obtained.” So, here, the damages to which the plaintiff might be entitled, were not ascertained at the time the defendant went to prison, and although the 61st section of the statute 7 *Geo.* 4, c. 57, enacts—“That, after any person shall have become entitled

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(a) 2 Chit. 222.

(b) 3 Barn. & Ald. 407.

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to the benefit of the act, no writ of *fiery facias* shall issue on any judgment obtained against a prisoner for any debt or sum of money, with respect to which such person shall have so become entitled;" yet the words *debt or sum of money* can only apply to a debt or sum ascertained and actually due to a creditor from the insolvent at the time of his first imprisonment.

Mr. Serjeant *Merewether*, in support of his rule.—Although the damages awarded to a plaintiff in replevin are merely nominal, yet the sum for which the defendant was liable in this case, was ascertained when the plaintiff's attorney delivered his bill of costs. The defendant, therefore, properly inserted in his schedule the amount of such bill, as being the claim the plaintiff then had against him. Although the plaintiff had notice that the defendant had been discharged under the act, he proceeded to execute a writ of inquiry, and afterwards signed final judgment; and although the words *debt or sum of money* are introduced in the sixty-first section, yet the act seems to include damages to be ascertained under a judgment; for, by the fifty-seventh section it is enacted—"That, before any adjudication shall be made in the matter of the petition of a prisoner, the Court shall require him to execute a warrant of attorney to authorize the entering up of a judgment against such prisoner in some one of the superior Courts at *Westminster*, in the name of the assignee of such prisoner, for the amount of the debts stated in his schedule to be due, or claimed to be due from such prisoner, or so much thereof as shall appear, at the time of executing such warrant of attorney, to be due and unsatisfied; and if at any time it shall appear, to the satisfaction of the Court, that such prisoner is of ability to pay such debts or any part thereof, the Court may permit execution to be taken out upon such judgment, for such sum of money, as, under all the circumstances of the case, the Court shall order;—such sum to be

distributed rateably amongst the creditors of such prisoner; and such further proceedings may be had upon such judgment, as may seem fit to the discretion of the Court, from time to time, until the whole of the debts due to the several persons against whom such discharge shall have been obtained, shall be fully paid and satisfied." It was, therefore, the intention of the Legislature to discharge the insolvent from any claim capable of being ascertained at the time of his discharge. The cases cited do not apply, as they were decided on the construction of previous statutes; and here, the bill of costs delivered to the defendant by the plaintiff's attorney, was a debt ascertained and due, and which was inserted in the schedule accordingly.

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Lord Chief Justice TINDAL.—It appears to me, that this rule must be discharged. The application to set aside the writ of *fiery facias* and levy, was grounded on the 61st section of the statute 7 Geo. 4, c. 57, by which it is enacted, that "after any person shall have become entitled to the benefit of that act, by any such adjudication as therein mentioned, no writ of *fiery facias*, or *elegit*, shall issue on any judgment obtained against such prisoner, for *any debt or sum of money*, with respect to which such person shall have so become entitled, nor in any action upon any new contract or security for payment thereof, except upon the judgment entered up against such prisoner, according to the act." The question then is, whether the plaintiff's claim can be considered as *a debt or sum of money*, in respect of which the defendant was entitled to take the benefit of the act? I am of opinion, that, by the terms of the statute, such debt or sum must be confined to debts due from the insolvent at the time of his first imprisonment; and here, there is no pretence for saying, that, at that time, there was any debt due from the defendant to the plaintiff; for, this being an action of replevin, the defend-

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ant was only liable to a claim by the plaintiff for unascertained and uncertain damages; and there are no words in the statute which can be taken to have relation to such a liability. Further, it appears to me, that under a suit pending at the time of the defendant's first imprisonment, the terms of the act could not be complied with by inserting a sum in the schedule, as due from the insolvent to his creditor, the amount of which was uncertain, until final judgment was obtained. As, therefore, the words *debt or sum of money* cannot refer to unascertained or unliquidated damages, I am of opinion, that the 61st section does not apply to this case, and, consequently, that the writ and execution must stand.

The rest of the Court concurring—

Rule discharged.

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The defendants entered into an agreement with their creditors, that trustees, should be appointed for the purpose of settling the defendants' affairs, by the collection, sale, and division of their estate and effects, equally among the creditors, who agreed that the trustees should take a conveyance and assignment of the estate and effects, and manage the defendants' affairs until each creditor should have received full payment of his debt, the surplus to be paid over to the defendants; who agreed to make a conveyance and assignment of all their estate to the trustees, whenever thereunto required, and that all usual and necessary clauses should be inserted in the deed of conveyance. The trustees took possession of the defendants' effects, and paid their creditors ten shillings in the pound. A deed of conveyance was prepared, which the trustees called on the defendants to execute, but which they refused to do, as it did not contain a clause of general release. At the time the deed was tendered, one of the defendants only was present, and the meeting at which it was produced was adjourned, for the purpose of procuring the assent of the other defendant. The plaintiffs (creditors), although they had signed the deed and received ten shillings in the pound, sued the defendants for the residue of their original debt:—*Held*, that the action was premature, as the parties, by entering into the agreement, contemplated a suspension of the right of the creditors to sue:—and it seems that a clause of a general release from the creditors in such a deed is a usual and reasonable clause.

TATLOCK and Another v. SMITH and Others.

THIS was an action by the plaintiffs, as drawers, against the defendants, as acceptors of certain bills of exchange, amounting to 1,498*l.*, a moiety of which the plaintiffs sought to recover by this action.

At the trial, before Lord Chief Justice *Tindal*, at *Guildhall*, at the adjourned Sittings after the last Term, it appeared, that, on the 22nd October, 1827, which was subsequent to the acceptance of the bills in question, the defendants, being in insolvent circumstances, entered into an agreement with the plaintiffs and others, who were their creditors, by which the defendants consented that three persons should be appointed trustees, managers, and directors of their estate, for the purpose of winding up and settling their affairs, and the defendants agreed to make an assignment of all their estate and effects to the trustees, whenever required so to do. The agreement was as follows:—

“*Memorandum*, that we, the undersigned, creditors of *Leny Smith*, and *Leny Deighton Smith*, of *Paternoster-Row* and *Hackney*, crape manufacturers, do hereby, with their consent, testified by them and ourselves severally, being parties to and signing this memorandum, agree to appoint *Robert Dodgson*, of *Wood Street, Cheapside*, silk merchant, *Richard Thomas*, of *Fen Court, London*, Gentleman, and *William Jones Brown*, silk merchant, to be trustees, managers, inspectors and directors of their estate and effects, for the purpose of winding up and settling their affairs, by the collection, sale, and division, of their estate and effects, equally amongst us their said several creditors; and we, the undersigned creditors, hereby severally consent and agree, that the said *Robert Dodgson*, *Richard Thomas*, and *William Jones Brown*, shall take a conveyance and assignment of the estate and effects, and shall receive and pay, direct and manage, in all the said affairs, until each creditor shall have received the full payment of our said several debts; the surplus to be paid over to the said *Leny Smith*, and *Leny Deighton Smith*; and it is further agreed, that when sufficient monies shall be collected and raised from the said estate and effects to pay all the creditors two shillings and sixpence in the pound upon their said several debts, the said *Robert*

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Dodgson, Richard Thomas, and William Jones Brown, shall make and pay such dividend, and so on, a further like dividend of two shillings and sixpence in the pound, until their said several creditors shall be paid the whole of their said debts:—and the said *Leny Smith* and *Leny Deighton Smith* do hereby agree to make the said conveyance and assignment of all their said estate and effects unto the said *Robert Dodgson, Richard Thomas, and William Jones Brown*, whenever thereunto required; in which said deed is to be inserted, all other usual and necessary clauses and conditions. And it is lastly agreed, that this agreement is to be void, unless all the creditors whose debts shall amount to 20*l.* and upwards, shall sign the same within fourteen days from this date. As witness the hands of the several parties, this 22d day of *October*, 1827.”

This agreement was signed by the plaintiffs, and several other creditors of the defendants’. The trustees carried on the defendants’ business, and, by the sale of their personal property and effects, paid the creditors ten shillings in the pound, by three several instalments. The trustees then called on the defendants to execute a deed of conveyance of their estate, pursuant to the agreement, to which they objected, unless the deed contained a clause of general release from all the creditors. A general meeting of the creditors was afterwards held, at which a deed of conveyance was tendered to one of the defendants, (the other being in the country), containing a clause of release, which he insisted was insufficient, and refused to execute the deed. The meeting was then adjourned, in order to ascertain whether the other defendant would consent to execute the deed; and, in the mean time, the plaintiffs commenced this action, to recover the remaining ten shillings in the pound due from the defendants as the acceptors of the bills in question.

His Lordship thought, that, under these circumstances,

the action was prematurely brought; because, both the defendants, on the return of the one from the country, might have consented to execute the deed. He also thought, that it was reasonable for the defendants to require a clause of general release to be inserted in the deed; and directed a nonsuit.

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Mr. Serjeant *Adams*, on a former day in this Term, obtained a rule *nisi*, that this nonsuit might be set aside, and a verdict entered for the plaintiffs instead thereof, on the ground, that the defendants, by refusing to execute the deed of conveyance, unless a clause of release were inserted, had rescinded the agreement which the plaintiffs and the other creditors had entered into, and, therefore, that the defendants were liable to be sued for the sum originally due to the plaintiffs, as if no such agreement had been made. Although the plaintiffs had been paid ten shillings in the pound out of the defendants' effects, it would not discharge the original debt; for, in *Fitch v. Sutton* (a), it was held, that the acceptance of a less, cannot be a satisfaction in law of a greater sum then due, nor can it operate as an extinguishment of the original cause of action, though accompanied by a conditional promise to pay the residue when of ability. So, in *Heathcote v. Crookshanks* (b), it was held that an agreement between a debtor and his creditors, that they would accept a composition in satisfaction of their respective debts, to be paid in a reasonable time, cannot be pleaded to an action brought by one of the creditors, to recover his whole demand. Although, in *Steinman v. Magnus* (c), where a debtor entered into an agreement with his creditors, whereby they agreed to receive twenty *per cent.* in satisfaction of their several demands, and released the remainder, in consideration that half of

(a) 5 East, 230.

(b) 2 Term Rep. 24.

(c) 11 East, 390.

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the composition should be secured by the acceptances of a certain person (also a creditor), which security was accordingly given, and paid when due; it was held, that such agreement was binding on the plaintiff, one of the creditors, though the agreement was not under seal, and though he was the last who signed it; and, it did not appear that he had actively induced any of the other creditors or the surety to sign it, and that the plaintiffs' suing the debtor after having received the composition, was a fraud upon the surety and the other creditors: yet that case was decided upon the ground that it was a fraud upon the surety. Unless, therefore, there has been an actual assignment of the *whole* of the debtor's property, or a third person has been induced to become surety for part of the debt, on the supposition that his principal will be thereby discharged of the remainder, or time has been given by the creditor to his debtor, for payment of *part of the debt only*, by instalments, the creditor has a right to resort to his original demand. But here, there has been no conveyance of the defendants' estate to the trustees, nor was time given by the creditors, nor were the rights of third parties affected; and, by the agreement, the trustees were to retain possession of the estate, until the several creditors should have been paid the whole of their debts. A release by the creditors was, therefore, unnecessary, and was not contemplated by the parties, at the time the agreement was entered into. Although, in *Boothbey v. Sowden (a)*, where the plaintiffs signed an agreement to take the defendants' notes for the payment of the amount of their respective demands, by instalments, provided the rest of the creditors would do the same; it was held, that the signing of the other creditors was a sufficient consideration for the plaintiff's promise, and that they could not resort to the original cause of action without shewing a breach of the agree-

(a) 3 Camp. 175.

ment on the part of the defendants; yet the authority of that case was doubted by Lord *Ellenborough*, in *Cranley v. Hillary*, where his Lordship said (a)—“If any thing incorrect was laid down in *Boothby v. Sowden*, there is no reason why we should adhere to it now.” In *Cranley v. Hillary*, the plaintiff, the drawer of a bill of exchange, accepted by the defendant, agreed with him and the rest of his creditors, to take a composition of eight shillings in the pound, to be secured by promissory notes to be given by the defendant payable on days certain, and that the defendant should assign to the creditors certain debts, upon which they should execute a general release; and the assignment was executed, and all the creditors except the plaintiff, received their composition and executed the release, and the plaintiff might have received his promissory notes, if he had applied for them, but it did not appear that the defendant had ever tendered them to the plaintiff, or that he had ever asked for them; and the plaintiff afterwards, and after the days of payment of the promissory notes had expired, sued the defendant on the bill of exchange; the Court held, that he was not precluded by the agreement from recovering. Here, however, the defendants refused to execute the conveyance, although they had agreed to pay their several creditors twenty shillings in the pound, which was to be derived from the whole of their estate and effects. In *Cork v. Saunders* (b), the insolvent agreed to assign his property to his creditors immediately, and they undertook to enter into an agreement to release the insolvent from his debts, on receiving such a composition as the produce of his effects would admit of; and Mr. Justice *Holroyd* said (c)—“The effect of this agreement to release, seems to be this, not that the composition should operate immediately as a satisfaction when

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(a) 2 Mau. & Selw. 122.

(b) 1 Barn. & Ald. 46.

(c) Id. 50.

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paid, but that the creditors were then to give a formal release by deed, and that the debtor was not to be discharged until such deed was executed." In *Butler v. Rhodes* (a), the debtor parted with *all his property* to trustees for the benefit of his creditors. In *Jolly v. Wallis* (b), the creditors who had not signed the deed, accepted of the composition, which therefore bound them; and, in *Thomas v. Courtenay* (c), where the creditors of an insolvent agreed, by an instrument not under seal, that they would accept, in full satisfaction of their debts, twelve shillings in the pound, payable by instalments, and would release him from all demands; one of the creditors who signed for the whole amount of his debt held at the time, as a security for part, a bill of exchange drawn by the debtor, and accepted by a third person: the money due on this bill having afterwards been paid by the acceptor, it was held, that the creditor might retain it—the agreement of composition not containing any stipulation for giving up securities, and the effect of it not being to extinguish the original debt.

Mr. Serjeant *Wilde*, now shewed cause.—By the agreement of *October, 1827*, the defendants agreed to make a conveyance and assignment of all their estate and effects to three trustees named in the agreement, whenever thereunto required, in which deed of conveyance and assignment was to be inserted all usual and necessary clauses and conditions. The main object of the agreement was, to divest the defendants of all their property, in order that it might be applied in discharge of their debts; and a mere refusal by one of them to execute the deed, in the absence of the other, did not remit the plaintiffs, as creditors, to their original rights. Besides, neither of the defendants refused to execute a deed of conveyance containing all usual and

(a) 1 Esp. Rep. 236.

(b) 3 Esp. Rep. 228.

(c) 1 Barn. & Ald. 1.

necessary clauses; and the introduction of a general release by the creditors, was not only usual and reasonable, but one which the defendants had a right to insist on. The trustees were not only nominated and appointed to be managers and directors of the defendants' estate and effects, for the purpose of winding up their affairs, but they actually sold part of the stock, by which they were enabled to and did pay the several creditors, ten shillings in the pound. It was contemplated, at the time the agreement was entered into, that the defendants' estate would exceed the amount of their debts; as, after each of the creditors had received the full payment of twenty shillings in the pound, the surplus was to be paid over to the defendants. They did not undertake to execute the deed of conveyance *instantly*, and it would be most unjust, after they had given up all their property for the purpose of satisfying their creditors, that some of those creditors who had assented to the arrangement, and received the benefit of the agreement, by being paid one half of their original demand, should still have the power of proceeding against the defendants, and incarcerating them in a prison. In *Cork v. Saunders*, the agreement contained a stipulation that an assignment should be *immediately made* by the defendant of all his estate and effects, and not *whenever thereunto required*, as in this case; and Lord *Ellenborough* said—"The plaintiff, by the terms of the agreement, consents that the property of the defendant shall be assigned, and be in the management exclusively of the defendant, under the direction of the trustees, until *Michaelmas*. How can the plaintiff, then, replace the other creditors in the same situation? I should have been inclined to remit him to his original rights, if all the other parties could have been placed in their original situation; but that is impossible. This is an anomalous case, in which the plaintiff cannot stand in his former situation, nor can I say at present that the whole shall be nullified." And Mr. Justice

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Bayley said—"By the terms of the agreement, it is stipulated that the farming concern shall be carried on until *Michaelmas*, for the benefit of the creditors who might concur; and it contains a further stipulation, that the debtor shall assign all his estate *immediately*; the consequence of which would be, that he would thereby divest himself of all means of payment. It is true, that the defendant remains in possession, but as servant only to the trustees, he has not a single article of property, which he can appropriate to the payment of his debts. The plaintiff confides in the trustees, that they will perform the duties reposed in them; this they neglect to do, and they postpone the period at which they ought to sell. The non-division, however, of the property, cannot, under the circumstances, remit the creditor to his original rights. The parties not having provided for that event by the terms of the agreement, it appears to me that their only remedy is in equity. Suppose the trustees had refused to sell, and the defendant had urged them on, could the plaintiff have sued in that case? The conduct of the defendant, in respect of the postponement, amounts only to this, that he does not find fault with the trustees. But I do not think that that puts the plaintiff in a better situation than if the postponement had been the mere act of the trustees." That case is far stronger than the present, and if the plaintiffs seek to rescind the agreement, it must be avoided *in toto*, although they have acted under it, and received a moiety of their original debt, from the proceeds of the defendants' effects. The case of *Cranley v. Hillary* does not touch the present, as it did not appear that the defendant had ever tendered to the plaintiff the promissory notes which he agreed to receive by way of composition. Here, however, all the property of the defendants was vested in the trustees, at the instance and request of the creditors, and as a surplus was anticipated, the agreement must be taken to

operate as a full satisfaction of their debts, and a suspension of the rights of such creditors to sue, nor could they afterwards resort to their original demands.

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Mr. Serjeant *Adams*, in support of his rule.—The Court must look at the terms of the agreement, and see what has been done under it. The defendants have refused to execute the deed of conveyance, and the creditors have only received ten shillings in the pound. If, therefore, the Court hold, that the plaintiffs, by signing the agreement, are to be deprived of being remitted to their original rights, and prevented from suing the defendants in this action, it will be contrary to all the previous authorities. The defendants have not *assigned the whole* of their estate to the trustees, but actually refused to execute a conveyance of a considerable part of it, and until such conveyance be executed, the property remains in the defendants; and although the creditors have received ten shillings in the pound, yet they have a right to insist that the whole of the defendants' property should be made available to the payment of their debts, and they ought not to be driven into a Court of equity for relief. In *Cork v. Saunders*, two of the creditors consented to be answerable for a sum to defray the expenses of carrying on the concern. So, in all the other cases, funds were to be provided by third persons, or some of the creditors of the debtor. In *Cooling v. Noyes*, Mr. (afterwards Lord Chief Justice) *Gibbs* said, in the course of his argument (a), “that though, in *Heathcote v. Crookshanks* (b), it was decided that an agreement between a debtor and his creditors, that they would accept a composition in satisfaction of their debts, where no fund was appropriated for the payment of them, could not be enforced, as being *nudum pactum*, perhaps, on a re-examination, it might be held, that there was a consideration to each creditor for the promise to accept a part

(a) 6 Term Rep. 264.

(b) 2 Term Rep. 24.

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in lieu of the whole, namely, a forbearance by the other creditors to sue the debtor." So, here, as the defendants refused to convey the whole of their estate for the payment of their debts, the agreement was a mere *nudum pactum*, and the creditors were remitted to their original rights. The sole object of the parties was, that the creditors at large should be paid the whole of their debts out of the defendants' estate, and such creditors were not bound to give a release, nor had the defendants any right to insist on the introduction of a clause to that effect in the deed of conveyance.

Lord Chief Justice TINDAL.—The ground on which I directed the plaintiffs to be nonsuited was, that they were not in a situation to bring this action, after the agreement they had entered into; unless they could shew that it was no longer in force, or that it had been broken by the defendants. But there was a total absence of proof of either of these facts. The parties, by entering into the agreement, contemplated a suspension of the plaintiffs' right to sue as creditors, whilst the agreement was in operation; and I am of opinion that such suspension still continues. By the agreement, three persons therein named were appointed trustees, and the estate and effects of the defendants were vested in them, and they were to wind up and settle their affairs by the collection, sale, and division of the defendants' estate and effects equally among the several creditors, who consented and agreed that the trustees should take a conveyance and assignment of the defendants' estate and effects, and should receive, pay, direct, and manage in all the said affairs, until each creditor should have received the full payment of their several debts, the surplus to be paid over to the defendants. And it was further agreed "that when sufficient monies should be collected and raised from the said estate and effects, to pay all the creditors two shillings and sixpence in the pound upon their said several debts, the

trustees should make and pay such dividend; and so on, a further like dividend of two shillings and sixpence in the pound, until the said several creditors should be paid the whole of their said debts." The agreement, therefore, of itself implies a right in the trustees to take possession of all the tangible property and effects of the defendants, in order to pay the several creditors the amount of their debts; and it appears that the trustees had actually taken and sold the effects, and paid ten shillings in the pound out of the proceeds. Is it therefore consistent or reasonable to suppose, that debtors, who have surrendered the whole of their property to trustees, should still remain liable to the hostile attacks of their creditors? The very terms of the agreement preclude such a supposition, as the defendants thereby agreed to make the conveyance and assignment of all their said estate and effects unto the trustees, whenever thereunto required; in which deed was to be inserted, all other usual and necessary clauses and conditions. If, indeed, a conveyance had been tendered to both the defendants at a general meeting of the creditors, and each of them had absolutely refused to execute it, I do not say whether such refusal might not have remitted the creditors to their original rights, and been a sufficient ground for them to maintain actions founded upon those rights; but here, there was no evidence that a conveyance was tendered to both the defendants, for one only was present at the meeting; and he said, that he would not execute the deed, as he thought the clause of release was insufficient; and the meeting was adjourned, in order to ascertain whether the other defendant, on his return from the country, would execute the conveyance. This, therefore, was a mere suspension of the execution of the deed; and no step appears to have been taken afterwards, nor does it appear that the conveyance was afterwards tendered to the other defend-

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ant. I am therefore of opinion, that no breach of the agreement can be imputed to both the defendants, so as to remit the plaintiffs to their original right of action against them.

Mr. Justice PARK.—In concurring with my Lord Chief Justice, I wholly disclaim the introduction of any new principle, or the impugning the authority of any previous decision; for I think both the defendants should have been required by the creditors who attended the general meeting to execute the conveyance, according to the terms of the agreement; and as the refusal of one merely led to a suspension of the execution by both, as there was an adjournment until it could be ascertained whether or not the other defendant would sign the deed, I am of opinion, that this action was prematurely brought.

Mr. Justice BURROUGH.—This appears to me to be the clearest case possible. It requires no previous authority or decision to guide or assist us. By the terms of the agreement, the trustees were to have the produce of the estate and effects of the defendants, to pay their several creditors, and ten shillings in the pound were actually paid out of their effects. Nothing was afterwards done to rescind the terms of that agreement; and, for any thing that appears to the contrary, it still continues in full force. Is there then any consideration to be implied upon the face of it for the defendants' undertaking? They agreed to convey their property to trustees, in consideration of their creditors forbearing to sue, and such a forbearance is of itself a sufficient consideration for a promise. There can be no doubt but that a court of equity would compel an execution of the contract, and direct a conveyance to be made by the defendants to the creditors who had signed the deed; and, as there has been no direct act by both

the defendants to rescind or annul the agreement, the creditors may still enforce a specific performance.

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Mr. Justice GASELEE.—I am of opinion that this action was, at least, prematurely brought. There was no positive refusal by both the defendants to execute the deed of conveyance. It is, therefore, unnecessary to consider the effect of the clause of release being objected to by one of them who attended at the meeting in the absence of the other; and as the meeting was adjourned, for the purpose of ascertaining whether the other defendant would sign the deed or not, it cannot be considered as an absolute refusal by both. As, therefore, the meeting was adjourned for that purpose, I confine my opinion to that point only; and considering that the action was premature, I am of opinion that the view my Lord Chief Justice took at the trial was correct; and, consequently, that the rule for setting aside the nonsuit must be—

Discharged.

BRITISH MUSEUM, (Trustees of) v. WHITE.

Wednesday,
Nov. 25th.

THIS was a feigned issue, upon the question, whether *William White*, deceased, did, by a certain paper writing, purporting to be his last will and testament, devise his freehold estates or not. Upon the trial, the Jury found a special verdict, setting out the paper writing in question, and finding that the whole of the same, except the names of the witnesses, was in the hand-writing of the said

A testator wrote and signed his will, by which he devised his real estates. He afterwards requested two persons to sign their names to it, which they did in his presence, but they did not see the signature of the testator, nor did he ever inform them of the nature of the instrument they had signed. Some time afterwards, the testator requested a third person to sign his name, which he did in the presence of the testator, who told him that the paper in question was his will. Immediately above the names of the witnesses, there was written by the deviser, "in the presence of us as witnesses thereto:—*Held*, that this was a sufficient attestation and subscription of the will, by the three witnesses, within the statute of frauds.

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William White, and that the said *William White* signed the said paper writing before it was signed by the three witnesses, namely, *John Hounslow*, *Mary Bristow*, and *Thomas Badcock*, or either of them; that *William White* died on the 13th of *May*, 1823; that about five months before his death, he requested two of the above witnesses, namely, *John Hounslow* and *Mary Bristow*, to sign their names to the said paper writing, and they respectively, in pursuance of such request, did sign the same in the presence of the said *William White*; but that they did not see the signature of the said *William White* to the said paper writing, nor were they informed by the said *William White*, when they so signed the said paper writing, or at any other time, what was the nature thereof, or the purpose for which he requested them to sign the same; that about three months before the death of the said *William White*, he requested the other witness, namely, the said *Thomas Badcock*, to sign his name to the said paper writing, which he immediately did in the presence of the said *William White*; that, at the time of signing the said paper writing by the said *Thomas Badcock*, the said *William White* told him that the said paper writing was his will. The special verdict then went on to state that the paper writing consisted of two sheets of paper, produced and shewn to the Jurors, and that the two sheets were in the same room at the times of the respective signatures of the three persons above mentioned, and that *William White* was of sound and disposing mind and memory at the time he signed the paper, and when the three other persons signed their names as aforesaid.

From an inspection of the instrument set out in the special verdict (a), it appeared that the signatures of the names of the three witnesses could not possibly enure to charge themselves or any other person, and could not have

(a) The Court, previously to the argument, required a *fac simile* of the will to be sent to them.

been placed there for any other purpose than to make them witnesses to the will; and it also appeared that, immediately above the signatures of the witnesses, these words were written by the testator in his own hand, *viz.* "In the presence of us as witnesses thereto."

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The case came on for argument in the last term.

Mr. Serjeant *Wilde* for the plaintiffs (*a*).—The only question is, whether, from the facts above set out in the special verdict, the will of *William White*, the testator, was duly executed, and in compliance with the requisitions of the statute of frauds (29 Car. 2, c. 3), the fifth section of which enacts, "That all devises and bequests of any lands or tenements shall be in writing, and signed by the party so devising the same, or by some other person in his presence, and by his express directions, and shall be attested and subscribed in the presence of the said devisor by three or four credible witnesses, or else they shall be utterly void and of none effect." The statute prescribes three things; *first*, that a will must be in writing, and signed by the devisor; *secondly*, that it must be attested and subscribed by three or four credible witnesses; and *lastly*, that it must be attested and subscribed by the witnesses in the presence of the devisor. Here, the special verdict has found that the whole of the will was in the hand-writing of the testator, and was signed by him before it was signed by the three witnesses; and also, that the will was subscribed by the witnesses in the presence of the devisor. The only question then is, whether, under the circumstances, the subscription of the witnesses is not also an attestation? If it be, all the requisites of the statute have been complied

(*a*) The testator directed certain trustees named in the will to sell one of his freehold estates, and to pay the proceeds to the trustees of the *British Museum*.

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with. It is not necessary that the witnesses should see the devisor sign, or that he should sign in their presence. *Grayson v. Atkinson* (a), *Ellis v. Smith* (b). It is sufficient that the devisor should declare to the witnesses that the instrument offered to them to be subscribed, is his will, and that the signature is his hand-writing. Neither is it necessary that the will should be attested and subscribed by all the witnesses at the same time; for, in *Jones v. Lake* (c), where the devisor signed and executed his will in the presence of two witnesses, who attested it in his presence, and some time after he sent for a third witness, and published it as his will, in his presence, it was held to be duly attested. So, the witnesses need not know that the instrument to which they have subscribed their names is a will. It would be sufficient to prove the signature of the testator to be his hand-writing.

[Lord Chief Justice *Tindal*.—If the will be not signed by the devisor in the presence of the witnesses, must he not declare or acknowledge it to be his will?]

Here, the testator requested two of the witnesses to sign their names to the will in his presence, and he told the last witness that it was his will; and as the instrument had been signed by him before it was attested by either of the witnesses, it is sufficient. All the witnesses put their signatures to the instrument for the same purpose, *viz.*, as attesting witnesses to the will. The main object of the Legislature, when the statute in question was passed, was, to prevent a false document or instrument being substituted for that which the devisor requested the witnesses to subscribe, and which they might afterwards be able to attest by the recognition of their own hand-writing. In *Stonehouse v. Evelyn* (d), it was proved, that three subscribing witnesses to a will had subscribed their names in the presence of the testatrix, but one of them said, that he did

(a) 2 Vez. 454.

(b) 1 Ves. jun. 11; S. C. 1 Dickens, 225.

(c) 2 Atk. 176, n.

(d) 3 Peere Wms. 254.

not see her sign the will, but that she owned at the time when the witnesses subscribed, that the name signed to the will was her own hand-writing; and it was held to be sufficient.

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In an *Anonymous* case (a), Chief Justice *Jefferies* seemed to be of opinion, that, if the whole of a will be written by the testator's own hand, and declared in the presence of three credible witnesses, it would be within the meaning of the statute, although not signed by him (according to the words of the act) in the presence of three credible witnesses. Although the subscribing witnesses ought to see the whole will at the time of signing it, for if they only see the last sheet on which they subscribe their names, it is doubtful whether that be sufficient; yet, according to the case of *Bond v. Seawell* (b), the presumption is, that all the sheets on which a will is written, are in the room where the witnesses attest, unless the contrary be proved; and here that fact was expressly found. In *Peate v. Ougly* (c), *Oliver*, Earl of *Bolinbrooke*, wrote his will on a sheet of paper with his own hand, and at the top was written, "Signed, sealed, and published as my last will and testament, in the presence of, the same being written here for want of room below;" this was likewise written by the testator's own hand, and then the names of the three witnesses were subscribed; two of those witnesses were dead, and the third was produced at the trial, who testified that he was servant to the testator four years, and, about twenty-seven or twenty-eight years ago, he and the other two witnesses were called up in the night, and sent for into the Earl's chamber, who produced a paper folded up, and desired him and the others to set their hands as witnesses to it, which they all three did in his

(a) *Skinner*, 227.

Wm. Blac. 407.

(b) 3 *Burr.* 1773; *S. C.* 1 *Sir*

(c) *Com. Rep.* 197.

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présence; but they did not see any of the writing, nor did the Earl tell them it was his will, or say what it was; but he believes this to be the paper, because his name is there, and the names of the other witnesses; and he never witnessed any other deed or paper for the Earl. And though the Earl did not set his name or seal to the will in their presence, yet he had often seen the Earl write, and believed the whole will and codicil to be of his handwriting:—Lord Chief Justice *Trevor*, before whom the cause was tried, thought there was sufficient evidence to find the will well executed; and the Jury found it accordingly. In *Trimmer v. Jackson* (a), where a will was delivered by a testator as his act and deed, and the words “sealed and delivered” were put above the place where the witnesses were to subscribe their names, it was adjudged to be a sufficient execution, although the witnesses were led to believe, from the words used by the testator at the execution of the instrument, that it was a deed, and not a will; and the case of *Wallis v. Wallis* (b), is an authority to shew that it is not necessary, that the testator should declare to the witnesses, at the time of the attestation, that the writing which they attest is his will.

Mr. Serjeant *Adams, contra*.—The only question is, whether the word *attested*, in the fifth section of the statute of frauds, is satisfied by the mere subscription of the names or signatures of the witnesses, without any information being given to them by the deviser at the time of their signature, as to the nature of the instrument subscribed. By the statute, the witnesses are not only to subscribe, but to attest and subscribe. The attestation, therefore, must be relevant to the act of the testator, *viz.*, an attestation that he signed in the presence of the witnesses. The object of the Legislature was, that the attesting wit-

(a) Burn's Ecclesiastical Law, 4th edit. Vol. 4, p. 117. (b) *Ibid.* 114.

nesses should know that the paper they signed had been previously signed by the testator; and although it has been decided, that it is not necessary for the testator actually to sign his will in the presence of the subscribing witnesses, yet there must be some acknowledgment or declaration by him to them, that he had done so. The statute was passed for prevention of frauds by the substitution of false wills; and if the subscribing witnesses were not informed by the testator, at the time of their attaching their signatures, that he had previously signed, or that the paper they were signing was his will, they would not be afterwards able to recognise it as such, or identify the paper they had signed. *Grayson v. Atkinson* is the leading case on this subject, where it was decided, that it is not necessary that a testator should sign his will in the presence of the witnesses, and that his acknowledging his handwriting to them was sufficient, although they signed their names at different times; and Lord Chancellor *Hardwicke* there said (a), "it is insisted, that the word *attested*, superadded to *subscribed*, imports, they shall be witnesses to the very act and *factum* of signing, and that the testator's acknowledging that act to have been done by him, and that it is his hand-writing, is not sufficient to enable them to attest: that is, it must be an attestation of the thing itself, not of the acknowledgment. To be sure, it must be an attestation of the thing in some sense; but the question upon this clause, as abstracted from the subsequent one, is, if they attest on the acknowledgment of the testator that that is his hand-writing, whether that is not an attestation of the act, and whether not to be construed as agreeable to the rules of law and evidence, as all other attestation and signing might be proved? At the time of making that act of Parliament, and ever since, if a bond or

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(a) 2 Vez. 457.

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deed is executed by the person who signs it; afterwards the witnesses are called in; and before those witnesses he acknowledges that to be his hand; that is always considered as an evidence of signing by the person executing, and is an attestation of it by them. It is true, there is some difference between the case of a deed and a will in this respect, because signing is not necessary to a deed, but *sealing* is; and I do not know it was ever held, that acknowledging his sealing without witnesses has been sufficient. But, notwithstanding, that is the rule of evidence relating to signing. If it was in the case of a note, or declaration of trust, or any other instrument not requiring the solemnities of a deed, but bare signing, if that instrument is attested by witnesses, proving that they were called in, and that he took that instrument, and said, that was his hand, that would be a sufficient attestation of signing by him. That is the rule of evidence. Considering, therefore, the words of the act of Parliament, it seems, upon the penning of that clause, that if the testator, having signed the will, did before those witnesses declare and acknowledge he had done so, and that that was his hand, that might be sufficient within that clause; for, as to the subscribing, that makes no difference in the case; that further circumstance is required by the statute, to make it necessary that they should certify their attestation, all of them in the presence of the testator; therefore is subscription mentioned. Other guards are put by the statute on the execution of a will besides the subscription, as, that it is to be in writing. *The testator must do some act materially declaring it to be his will, though no particular form of words is necessary.* It is true, there are cases where an instrument sealed and delivered, and subscribed by the testator, has been held sufficient to make it a will, *but there must be some act or declaration importing this to be a solemn act by him to dispose of his estate. I should have thought, the greatest*

guard upon the testator's executing a will would be the requiring all the witnesses to be together at the time. Yet it is admitted, that so far the cases have gone, that the testator's signing in the presence of the witnesses may be at different times." In *Trimmer v. Jackson*, the testator delivered the instrument as his act and deed, and the words "sealed and delivered" were put above the place where the witnesses were to subscribe their names, and the Court held it to be a sufficient execution in consideration of the inconveniences that might arise in families from its being known that a person had made his will. In *Wallis v. Wallis*, the testator desired the three attesting witnesses to take notice, and then took a pen, and, in all their presence signed and sealed each part of his will, and laid both the parts open and unfolded before them to subscribe their names as witnesses thereto, which they all did by the direction of the testator, in his presence, and in the presence of each other, he shewing them severally where to write their names. In *Westbeeck v. Kennedy (a)*, the testator produced his will, and declared it to be his last will; and it was held to be sufficient, although all the three witnesses were not present together at the execution, the testator having recognised the signature to be his; and all the cases on the subject were there referred to, from which the principle may be deduced, that a testator must either sign his will in the presence of the witnesses, or acknowledge the instrument to be his will, and that a mere request to the witnesses to sign it, is not sufficient. Although it may be said that, as in this case the testator told one of the witnesses, at the time of his signature, that the paper writing was his will, it is sufficient; yet, if the Court were to so hold, it would have the effect of repealing the statute, which not only requires a subscription, but an attestation by all the witnesses. A Court of equity requires, either that the

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three attesting witnesses shall be examined, or their depositions taken; and, in *Grayson v. Atkinson*, where one of the witnesses was beyond sea, Lord *Hardwicke* thought that a commission should be sent out to examine him. Although, in *Stonehouse v. Evelyn*, Mr. Justice *Fortescue* *Aland* is stated to have said, that it was the common practice, and sufficient, if one of the three subscribing witnesses swears the testator acknowledged the signing to be his own hand-writing; yet he said, that he had twice or thrice ruled it so, upon evidence on the circuit, where it is only necessary that one of the subscribing witnesses should be called, in order to establish a *prima facie* case. *Peate v. Ougly* is a mere *Nisi Prius* decision, and the facts are obscurely stated in the report. There, however, the testator made a will and codicil in his own hand-writing, and wrote at the top of the will, "signed, sealed, and published, as my last will and testament, in the presence of;" and the testator desired the three witnesses to set their hands *as witnesses* to it, which they all did in his presence; and the witness who proved that fact, stated, that he never witnessed any other deed or paper for the testator; and Lord Chief Justice *Trevor* merely inclined to think that there was sufficient evidence to find *the codicil* well executed; and the Jury found it accordingly. But, as Lord *Hardwicke* said, in *Grayson v. Atkinson* (a), "it is a much greater security against perjury, to require all to be present at the same time and instant of doing the act, because they then are checks on one another; but if suffered to be witnesses at different times and places, a more material guard is dispensed with than this, which relates barely to the act of signing;" and here, for any thing that appears to the contrary, the testator might have signed the will after two of the witnesses had subscribed their names; and, if the

(a) 2 Vez. 458.

mere subscription of the names of the witnesses can be deemed sufficient, the word *attested* in the statute will be rendered nugatory and as having no effect.

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Mr. Serjeant *Wilde* in reply.—In *Ellis v. Smith*, Lord *Hardwicke* said:—"To the maxim of Lord *Bacon* I shall oppose one of Lord *Trevor's*, that an established opinion is not to be receded from." Now, it has long been an established opinion, that the subscribing witnesses to a will need not see the act of signing by the testator, but that it will be sufficient if he has acknowledged to them, either to each separately, or to all at the same time, that the will is his, or that the signature is his hand-writing. Although the subscribing witnesses are to attest the signing, yet the statute does not direct that they should see the testator sign, or that he should sign in their presence; it requires only an attestation of the signing, *viz.* that the witnesses should be enabled to identify their hand-writing, and attest their signatures to the instrument. So, although the statute requires the witnesses to attest the signing, and to subscribe, it does not direct that they shall be all present at the same time, or that the testator should declare the instrument executed by them to be his will. It is sufficient if the witnesses attest and subscribe jointly or severally in the presence of the testator. Here, it is found as a fact, that the testator signed his will before he requested the witnesses to attach their signatures, and by his requesting them to subscribe their names, he merely meant to authenticate his will; and if he afterwards wished to make any alteration in it, he would have required other witnesses. Although it has been said, that the case of *Peate v. Ougly* is obscurely reported, yet it has been always treated as an authority by every text writer; and if the instrument in question had been a deed executed under a power requiring the attestation and signature of three witnesses, it would have been deemed a sufficient.

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execution under that power. An acknowledgment need not be by words, and the attestation of the signature of a party to an instrument may be established by his own acts, if tantamount to an acknowledgment; for instance, in the case of a dumb man, who may acknowledge his signature by signs. But, from the facts, as stated in the special verdict, there can be no doubt but that the will in question was well executed, and the plaintiffs are accordingly entitled to judgment.

Cur. adv. vult.

Lord Chief Justice TINDAL, having read the facts found by the Jury, as set forth in the special verdict, now delivered the judgment of the Court as follows:—

Upon this special verdict, the question is—whether, in the execution of this will, the several requisites contained in the statute of frauds have been duly observed? By the 29 *Car. 2*, c. 3, s. 5, it is enacted, “That all devises and bequests of any lands or tenements shall be in writing, and signed by the party so devising the same, or by some other person in his presence, and by his express directions, and shall be attested and subscribed in the presence of the said devisor, by three or four credible witnesses, or else they shall be utterly void, and of no effect.” And, as the special verdict finds that the whole of the paper writing is in the hand-writing of *William White*, and that he signed it before it was signed by the witnesses, the Jurors do find, in terms, that there is a devise in writing, and that it is signed by the party who makes the devise.

Again, it is expressly found, that the names of the three persons were signed by them upon the paper writing, in the presence of the said *William White*, that is, in the language of the statute, the writing was subscribed in the presence of the devisor. So that the inquiry is simplified and reduced to this single question—whether

the devise was *attested* by them within the meaning of the statute?

It has been held in so many cases, that it must now be taken to be settled law, that it is unnecessary for the testator actually to sign the will in the presence of the three witnesses who subscribe the same, but that any acknowledgment before the witnesses, that it is his signature, or any declaration before them, that it is his will, is equivalent to an actual signature in their presence, and makes the attestation and subscription of the witnesses complete. The case of *Ellis v. Smith* (a), which was decided by Lord Chancellor *Hardwicke*, assisted by the Master of the Rolls, Sir *John Strange*, Lord Chief Justice *Willes*, and Lord Chief Baron *Parker*, all persons of high and eminent authority, is express to the latter point. The objection, therefore, to the execution of the present will, does not rest upon the fact that it was not signed by *William White* in their presence, but that, with respect to two of the witnesses, namely, *Hounslow* and *Bristow*, there was no acknowledgment of his signature, nor any declaration that it was his will, but that they signed their names in entire ignorance of the nature of the instrument, or of the object for which their names were written. And it is argued, that if such subscription of their names satisfies the intention of the statute, the word *attested* will have no force whatever, and may be considered as if it had never been inserted. The question, however, appears to us to be, whether, upon this special verdict, the finding of the Jury establishes, although not an acknowledgment *in words*, yet an acknowledgment *in fact*, by the deviser to the subscribing witnesses, that this instrument was his will? For, if, by what the deviser has done, he must, in common understanding and reasonable construction, be taken to have acknowledged the instrument to be his will,

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we think the attestation of the will must be considered as complete, and that this case falls within the principle of *Ellis v. Smith*.

In the execution of wills, as well as that of deeds, the maxim will hold good "*non quod dictum est, sed quod factum est, inspicitur*" (a).

Now, in the first place, there is no doubt upon the identity of the instrument. The paper in question is the very paper writing which was produced by the testator to the three witnesses. The great object of the direction of the statute, that witnesses shall subscribe in the presence of the devisor, was to prevent the possibility of the witnesses returning to his hands any other instrument than the very instrument which he delivered to them to attest. This object has been attained in the present case, and the identity of the instrument is beyond dispute.

In the next place, it appears, from the special verdict, that the devisor was conscious himself that this instrument was his will. For the verdict finds that he was of sound and disposing mind, both at the time he signed it himself, and also at the time when the witnesses subscribed their names. But further, it appears to us, from the inspection of the instrument set out in the special verdict, that the signature of the three names could not possibly enure to charge themselves or any other person, and could not have been done for any other purpose whatever than simply to make them witnesses to the will. And lastly, it appears, from the same inspection, that, immediately above the names of the witnesses, there was written in the handwriting of the testator these words: "In the presence of us, as witnesses thereto," which do amount to a clear and unequivocal indication of the testator's intention that they should be witnesses to his will.

When, therefore, we find the testator knew this instru-

(a) See Co. Lit. 36. a.

ment to be his will; that he produced it to the three persons, and asked them to sign the same; that he intended them to sign it as witnesses; that they subscribed their names in his presence, and returned the same identical instrument to him, we think the testator did acknowledge *in fact*, though not *in words*, to the three witnesses, that the will was his. For, whatever might have been the doubt upon the true construction of the statute, if the case were *res integra*, yet, as the law is now fully settled, that the testator need not sign his name in the presence of the witnesses, but that a bare acknowledgment of his handwriting is a sufficient signature to make their attestation and subscription good within the statute, though such acknowledgment conveys no intimation whatever, or means of knowledge, either of the nature of the instrument, or the object of the signing;—we think the facts of the present case place the testator and the witnesses in the same situation as they stand where such oral acknowledgment of signature has been made; and we do, therefore, upon the principle of those decisions, hold the execution of the will in question to be good within the statute.

Judgment for the plaintiffs.

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DELAFIELD, Assignee of JONES, an Insolvent Debtor, v.
FREEMAN and Another.

In an action by the assignee of an insolvent debtor, certificated copies of the assignment to the provisional assignee, and of the assignment by him to the plaintiff as ultimate assignee, are, by sect. 19 of the stat. 7 Geo. 4, c. 57, sufficient to shew the title of the latter, and his right to sue, without proving that the petition of the insolvent had been filed in the Insolvent Debtors' Court.

An insolvent debtor is not a competent witness in an action brought by his assignee, although he offer to release his interest in the surplus of his estate, because his future property is liable to the payment of the debts in his schedule, and he is consequently interested in procuring the recovery of as much money as possible by his assignee.

Quære—Whether the assignee of an insolvent can maintain an action on the case against an attorney for negligence in preparing a lease for the insolvent, whereby his estate was lessened in value and damaged?

THIS was an action on the case, and brought by the plaintiff as assignee of the estate and effects of *David William Jones*, an insolvent debtor, against the defendants, to recover a compensation in damages for their alleged negligence as attorneys, in preparing an invalid lease from one *Henry Abbott* to the insolvent, whereby certain property which the latter would otherwise have obtained under the lease was lost to his estate. The defendants pleaded the general issue.

At the trial, before Lord Chief Justice *Tindal*, at *Westminster*, at the Sittings after the last Term, the plaintiff gave in evidence the order of adjudication of the Insolvent Debtor's Court for the discharge of the insolvent, together with certificated copies on parchment under the seal of that Court of the conveyance and assignment of the insolvent's estate and effects to the provisional assignee, and of the assignment by the provisional assignee to the plaintiff, as ultimate assignee. Both these instruments were sealed with the seal of the Court.

On the part of the defendants, it was contended, that this was not sufficient, as the plaintiff ought to have produced and proved the petition for the insolvent's discharge, upon which the proceedings were founded; and that, as the Insolvent Court, being a court of inferior jurisdiction, derived its authority solely by virtue of the filing of the insolvent's petition, it was at least incumbent on the plaintiff to shew that such petition had been duly filed.

The insolvent *Jones* was then called as a witness for the plaintiff, he having offered to release all claims and inter-

est in the surplus of his estate, but his competency was objected to, on the ground that his person only was discharged by the statute 7 Geo. 4, c. 57, and that his future property and effects were still liable to the payment of the debts inserted in his schedule, and, therefore, that he ~~was~~ interested in procuring the recovery of as much money as possible by the plaintiff as his assignee; and that, as the judgment entered up in the Insolvent Court operated on the future effects of the insolvent, he had an interest in reducing the amount to be recovered under that judgment. The Lord Chief Justice being of opinion that both the objections were well founded, directed a nonsuit.

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Mr. Serjeant *Taddy*, on a former day in this term, applied for a rule *nisi* that this nonsuit might be set aside and a new trial granted; and submitted—*First*, that the evidence adduced at the trial was sufficient to support the plaintiff's title to sue in his character of assignee; and *secondly*, that the insolvent was a competent witness, he having offered to release his interest in the surplus of his effects. *First*, although it may be said that the plaintiff should have shewn that the prisoner's petition was duly filed, as the Insolvent Debtor's Court derived its jurisdiction from that circumstance alone, and without which the Court had no power to interfere; yet, by the 3rd section of the statute 7 Geo. 4, c. 57, it is enacted, that that Court shall be a Court of record for the purposes of the act. The distinction, therefore, between Courts of general and Courts of limited or inferior jurisdiction, does not apply. The 57th section vests the after-acquired property and effects of the insolvent either in the provisional or ultimate assignee, as it directs that before any adjudication is made in the matter of the prisoner's petition, he must execute a warrant of attorney to authorize the entering up a judgment against him in some one of the superior Courts, in the

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name of the assignee, or the provisional assignee, if no other assignee shall have been appointed, for the amount of the debts stated in the schedule; and the 19th section (a) not only empowers the Insolvent Debtors' Court to appoint assignees, but enacts that the prisoner's estate shall be conveyed and assigned to them by the provisional assignee.

(a) By which it is enacted, "That it shall and may be lawful for the Insolvent Debtors' Court, at any time after the filing of the petition of any prisoner, as to the said Court shall seem expedient, to appoint a proper person or persons, being a creditor or creditors of such prisoner, to be assignee or assignees of the estate and effects of such prisoner, for the purposes of the act; and when such assignee or assignees shall have signified to the said Court his or their acceptance of the said appointment, the estate, effects, rights, and powers of such prisoner vested in such provisional assignee as aforesaid, shall immediately be conveyed and assigned by such provisional assignee to the said assignee or assignees, in trust for the benefit of such assignee or assignees and the rest of the creditors of such prisoner, in respect of, or in proportion to, their respective debts, according to the provisions of the act; and, after such conveyance and assignment by such provisional assignee, all the estate and effects of such prisoner shall be, to all intents and purposes, as effectually and legally vested by relation in such assignee or assignees as if the said conveyance and assignment had

been made by such prisoner to him or them:—Provided nevertheless, that no act done under or by virtue of such first conveyance and assignment, shall be thereby rendered void or defeated, but shall remain as valid as if no such relation had taken place; and that every such conveyance and assignment as aforesaid to such provisional assignee, and a counterpart of every such conveyance and assignment by such provisional assignee to such other assignee or assignees, shall be filed of record in the said Court, and a copy of such record, made upon parchment, and purporting to have the certificate of the provisional assignee of the said Court, or his deputy appointed for that purpose, indorsed thereon, and to be sealed with the seal of the said Court, shall be recognised and received as sufficient evidence of such conveyance and assignment, *and of the title of the provisional and other assignee or assignees under the same, in all Courts, and before commissioners of bankrupt and justices of the peace, to all intents and purposes, without any proof whatever given of the same, or of any other proceeding in the said Court, in the matter of such prisoner's petition.*"

nee; and that, after such conveyance and assignment, all the prisoner's estate shall be effectually and legally vested by relation in such assignees; and that every conveyance and assignment to the provisional assignee, and a counterpart of every such conveyance and assignment by him to such other assignees, shall be filed of record in the said Court; and that a copy of such record, made upon parchment, and purporting to have the certificate of the provisional assignee of the Court indorsed thereon, and to be sealed with the seal of the Court, shall be recognised and received as sufficient evidence of such conveyance and assignment, and of the title of the provisional and other assignees under the same, in all Courts, to all intents and purposes, without any proof whatever given of the same, or of any other proceeding in the Court, *in the matter of such prisoner's petition*. Although the 76th section was relied on for the defendants at the trial, and on which the nonsuit proceeded, and which enacts, that the proper officer of the Insolvent Debtors' Court shall, on the reasonable request of any prisoner, or of his creditors, produce and shew him or them the petition, schedule, &c. &c.; and that a copy of such petition, schedule, &c. &c. purporting to be signed by the officer in whose custody the same shall be, certifying the same to be a true copy, and sealed with the seal of the Court, shall be admitted as sufficient evidence of the same, without further proof than that the same is sealed with the seal of the Court; yet, it was not imperative on the plaintiff to produce them, to shew that he was entitled to sue as assignee, for, if all the insolvent's estate was duly conveyed to him, he had full power to sue by virtue of the 19th section of the act; and as the petition was recited in the conveyance and assignment to the plaintiff, the putting in the assignment was sufficient for the purposes of this action, as he did not stand in the situation of the insolvent, or a creditor requiring the production of the petition, or any other pro-

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ceedings previously to the conveyance and assignment to him.

Secondly, the insolvent was a competent witness, and his testimony ought to have been received at the trial. By the statute, he is relieved from all actions and suits, and his property is under the control, and subject to the direction of the Insolvent Debtors' Court. His interest, if any, is merely a contingent interest, which might or might not arise, and is not a direct or immediate interest. He has the same sum to account for out of any future property he may acquire. If his estate were sufficient to satisfy all the demands of his creditors, a judgment entered up against him, under the warrant of attorney, could not affect him; and, if it were not sufficient, the sum recovered in this action would not place him in a worse situation, unless, indeed, it were the precise sum that might turn the balance between payment of all his debts, or *minus* the plaintiff's demand, in which case, that fact should be shewn by the party who objected to his competency. The insolvent must be considered as standing in the same situation as a bankrupt, who, although his testimony might have the effect of increasing his funds, is, nevertheless, rendered competent, by executing a release to his assignees of the surplus, and of his allowance; and here the insolvent offered to release his interest in the surplus of his estate and effects.

Lord Chief Justice TINDAL.—Although the future effects of the insolvent are liable, until he has paid the creditors whose debts are included in the schedule, the whole of their demands in full, *viz.* to the amount of twenty shillings in the pound, and although his after-acquired property can only be obtained *sub modo*, namely, through the intervention of the Insolvent Debtors' Court; yet the insolvent has an immediate interest in conveying as much money as possible to his assignee, by which the amount to be re-

ceived under the judgment to be entered up on his subsequent effects would be lessened or reduced.

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Mr. Justice PARK.—*Primá facie*, an insolvent debtor is not a competent witness for his assignees, in an action brought at the suit of the latter. It appears to me that the insolvent in this case had an immediate interest in getting all the money he possibly could obtain, into the hands of the plaintiff, as his assignee. An insolvent debtor cannot be compared to a bankrupt, nor is there any analogy between the two cases; for, in order to render a bankrupt a competent witness, he must not only release his allowance and right to the surplus, but he must also have obtained his certificate, before the release can operate to make him a competent witness; for, the prospect of obtaining his certificate by increasing the fund, is an interest which renders him incompetent.

Mr. Justice BURROUGH and Mr. Justice GASELEE concurring, the rule was refused on the latter point, and granted on the first only.

Mr. Serjeant *Wilde*, and Mr. Serjeant *Jones* now shewed cause.—*First*, although the 19th section applies to the appointment of the provisional and ultimate assignees, and provides that the assignment to the former, and a counterpart by him to the latter, shall be filed of record in the Insolvent Court; and that a certificated copy shall be received as sufficient evidence of the title of the assignees, without any proof whatever given of the same; yet the concluding words of the clause are, “in the matter of such prisoner’s petition.” Unless, therefore, a schedule and petition had been presented by the insolvent, and duly filed, the Insolvent Debtors’ Court had no authority or jurisdiction to order his estate and effects to be conveyed or assigned to the provisional or ultimate assignees. The

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filing the petition was a condition precedent; and, in order to shew that the Insolvent Court had jurisdiction to act, the plaintiff should have shewn, in the *first* place, that the prisoner's petition had been, in fact, presented; and *secondly*, that it had been duly filed. The distinction applicable to this case, is not between Courts of record, and those which are not of record, but between Courts of general and Courts of special or limited jurisdiction; and the Insolvent Debtors' Court is a Court of the latter description. The only title the commissioners could possibly derive, was from the presenting of the petition and schedule of the insolvent; and, after they were filed in the Court, but not before, they were authorized in making an assignment of the debtor's estate and effects to the provisional assignee. The assignments, *per se*, are no evidence of the title of assignees as against third persons; and it is an established principle, that if a Court has only a limited and special jurisdiction, all the matters over which it has cognizance, must be produced in evidence, in order to lay a foundation for its interference, and to shew that it acted in conformity with, and in pursuance of the authority assigned to it. In *Brown v. Compton* (a), where the statute 37 Geo. 3, c. 112, authorized Justices of the Peace, at the first or second general Quarter Session to be holden after the passing of the act, or some adjournment thereof, to discharge insolvent debtors; and Justices at an adjourned session, held shortly after the act was passed, the adjournment being of a session held before the passing of the act, ordered the keeper of the Sheriff's prison to discharge an insolvent—it was held that the adjourned session had no jurisdiction. Although the language of the 19th section of the present act is very general, yet it alludes to other clauses, and does not of itself dispense with the proof of the authority of the Insolvent Court over the subject matter; and the 76th section is decisive

(a) 8 Term Rep. 424.

to shew, that the Legislature contemplated the necessity of proving the proceedings previous to the assignment and order of adjudication for the discharge of the prisoner, as the officer of the Court is required to produce the petition, schedule, and all other orders and proceedings made and had in the matter of such petition, and to furnish copies to persons requiring the same.

Secondly, this being an action on the case in nature of *tort*, for an alleged breach of duty by the defendants, for negligence in preparing a lease for the insolvent, the right of action did not pass to the plaintiff as his assignee. The statute only transfers the estate and effects of the insolvent to his assignee, and not the right of the former to recover damages for a supposed injury. In the case of a personal wrong, for instance, assault or slander, it is quite clear that the right of action would not pass to the plaintiff as the assignee of the insolvent. Although, by the 19th section, the estate, effects, rights, and powers of the prisoner are vested in the assignees, yet such rights must be connected with the estate or existing property of the insolvent; and although in *Smith v. Coffin* (a), it was held, that a right to bring a real action passed to the assignees of a bankrupt, yet it was by the policy of the bankrupt laws, and the particular words used in the deed of assignment. Here, the 20th section of the statute directs the assignees to sell the estate and effects of the insolvent. So, by the 14th section, the rights of the assignees are restricted to the real or personal property of the insolvent. But the injury complained of being in the nature of a *tort*, and sounding in damages, it gave the plaintiff no right to sue in his character of assignee, and there is, consequently, no ground for setting aside the nonsuit.

Mr. Serjeant *Taddy*, in support of his rule, was stopped by the Court.

(a) 2 Hen Blac. 444.

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Lord Chief Justice TINDAL.—I have listened with the greatest possible attention to a very ingenious argument, as to the construction of the 19th section of the statute; but I confess I have not been able to come to any other determination, than what appears to me the Legislature themselves intended, *viz.* that on the production of an authenticated copy of the conveyance and assignment to the provisional assignee, and a counterpart of such conveyance and assignment by him to the subsequent assignee or assignees, sealed with the seal of the Insolvent Debtors' Court, they shall be recognized and received as sufficient evidence of such conveyance and assignment, and of the title of the provisional and other assignee or assignees under the same, in all Courts, without proof of any other proceeding in the Insolvent Debtors' Court, in the matter of such prisoner's petition. If, indeed, the clause had stopped short at the words, "shall be recognized and received as sufficient evidence of such conveyance and assignment, and of the title of the provisional and other assignee or assignees under the same," it might have been limited to the mere dry proof of the assignment, and so much of the title as the assignees derived under it. But I am at a loss to know, how we can reject the words immediately following, *viz.* "in all Courts, &c., to all intents and purposes, without any proof whatever given of the same, or of any other proceeding in the said Court in the matter of such prisoner's petition." These latter words have a more extensive signification, and give a far wider latitude than the former; and, if my attention had been called to this clause at *Nisi Prius*, I should have come to a different determination, and thought as I now do, that it dispenses with all proof of the title of the assignee, beyond that which the plaintiff offered in evidence, *viz.*, the certificated copies of the assignment to the provisional assignee, and the counterpart of the assignment by him to the plaintiff; and there is no other clause to shew, that the assignee is obliged to

have recourse to evidence *aliunde*, or put in all the proceedings from the time of the filing of the prisoner's petition, in order to shew that he is entitled to sue in his character of assignee. As to the question, whether or not the injury of which the plaintiff complains, is of such a nature as to give him a right of action in his character of assignee, I at present abstain from giving any opinion, as the cause is not yet ripe for that discussion. The plaintiff, by this application to the Court, merely seeks to be relieved from the nonsuit; and as he will have an opportunity of re-trying this cause, the objection may be raised as to the nature of his claim;—and the grounds on which he seeks to recover against the defendants are set out on the face of the record.

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Mr. Justice PARK.—I am entirely of the same opinion. It is unnecessary to discuss the question, whether or not the Insolvent Debtors' Court be a Court of record for all purposes, or whether it be a Court of special or limited jurisdiction, because the words of the act are imperative upon us, and by which we must be bound. The 19th section conveys the whole of the insolvent's property to his assignee or assignees, who derive a complete title by the conveyance and assignment from the provisional assignee, and when the ultimate assignee has obtained such conveyance, he has a full authority to sue in his character of assignee. The 76th section does not appear to me to affect or impede the operation of the 19th, as far as it regards the assignees, or their title to sue as such. There may be circumstances that may render it necessary for a prisoner or his creditors to apply to the officer of the Court to inspect and examine the proceedings, and to take copies of them. But the 19th section expressly provides, that every assignment by the provisional assignee, and a counterpart of every assignment by him to the ultimate as-

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Wednesday,
Nov. 25th.

DELAFIELD, Assignee of JONES, an Insolvent Debtor, v.
FREEMAN and Another.

In an action by the assignee of an insolvent debtor, certificated copies of the assignment to the provisional assignee, and of the assignment by him to the plaintiff as ultimate assignee, are, by sect. 19 of the stat. 7 Geo. 4, c. 57, sufficient to shew the title of the latter, and his right to sue, without proving that the petition of the insolvent had been filed in the Insolvent Debtors' Court.

An insolvent debtor is not a competent witness in an action brought by his assignee, although he offer to release his interest in the surplus of his estate, because his future property is liable to the payment of the debts in his schedule, and he is consequently interested in procuring the recovery of as much money as possible by his assignee.

Quare—Whether the assignee of an insolvent can maintain an action on

the case against an attorney for negligence in preparing a lease for the insolvent, whereby his estate was lessened in value and damaged?

THIS was an action on the case, and brought by the plaintiff as assignee of the estate and effects of *David William Jones*, an insolvent debtor, against the defendants, to recover a compensation in damages for their alleged negligence as attorneys, in preparing an invalid lease from one *Henry Abbott* to the insolvent, whereby certain property which the latter would otherwise have obtained under the lease was lost to his estate. The defendants pleaded the general issue.

At the trial, before Lord Chief Justice *Tindal*, at *Westminster*, at the Sittings after the last Term, the plaintiff gave in evidence the order of adjudication of the Insolvent Debtor's Court for the discharge of the insolvent, together with certificated copies on parchment under the seal of that Court of the conveyance and assignment of the insolvent's estate and effects to the provisional assignee, and of the assignment by the provisional assignee to the plaintiff, as ultimate assignee. Both these instruments were sealed with the seal of the Court.

On the part of the defendants, it was contended, that this was not sufficient, as the plaintiff ought to have produced and proved the petition for the insolvent's discharge, upon which the proceedings were founded; and that, as the Insolvent Court, being a court of inferior jurisdiction, derived its authority solely by virtue of the filing of the insolvent's petition, it was at least incumbent on the plaintiff to shew that such petition had been duly filed.

The insolvent *Jones* was then called as a witness for the plaintiff, he having offered to release all claims and inter-

est in the surplus of his estate, but his competency was objected to, on the ground that his person only was discharged by the statute 7 *Geo.* 4, c. 57, and that his future property and effects were still liable to the payment of the debts inserted in his schedule, and, therefore, that he was interested in procuring the recovery of as much money as possible by the plaintiff as his assignee; and that, as the judgment entered up in the Insolvent Court operated on the future effects of the insolvent, he had an interest in reducing the amount to be recovered under that judgment. The Lord Chief Justice being of opinion that both the objections were well founded, directed a nonsuit.

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Mr. Serjeant *Taddy*, on a former day in this term, applied for a rule *nisi* that this nonsuit might be set aside and a new trial granted; and submitted—*First*, that the evidence adduced at the trial was sufficient to support the plaintiff's title to sue in his character of assignee; and *secondly*, that the insolvent was a competent witness, he having offered to release his interest in the surplus of his effects. *First*, although it may be said that the plaintiff should have shewn that the prisoner's petition was duly filed, as the Insolvent Debtor's Court derived its jurisdiction from that circumstance alone, and without which the Court had no power to interfere; yet, by the 3rd section of the statute 7 *Geo.* 4, c. 57, it is enacted, that that Court shall be a Court of record for the purposes of the act. The distinction, therefore, between Courts of general and Courts of limited or inferior jurisdiction, does not apply. The 57th section vests the after-acquired property and effects of the insolvent either in the provisional or ultimate assignee, as it directs that before any adjudication is made in the matter of the prisoner's petition, he must execute a warrant of attorney to authorize the entering up a judgment against him in some one of the superior Courts, in the

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or belonging, in the said indenture particularly described, together with all out-houses, &c. thereto belonging; to hold the said messuage or dwelling-house, yard, and all other the premises thereby demised, or intended so to be, with their appurtenances, unto the said *George Grain*, his executors and administrators, from the 25th day of *March* then last past, for, during, and until the full end and term of nine years from then next ensuing, and fully to be complete and ended; yielding and paying therefore, yearly, and every year, during the said term of nine years, unto the said *Francis Gibbons*, his heirs or assigns, the rent or sum of 80*l.*, by two equal payments in the year, to wit, on &c., &c. And the said *George Grain* and the defendant, for themselves jointly and severally, and for their and each of their joint and several heirs, executors, and administrators, did, by the said indenture, covenant, promise, and agree, to and with the said *Francis Gibbons*, his heirs and assigns, that they the said *George Grain* and the defendant, their executors or administrators, or some or one of them, should and would well and truly pay, or cause to be paid, unto the said *Francis Gibbons*, his heirs and assigns, the said yearly rent or sum of 80*l.* thereinbefore reserved and made payable on the days and times thereinbefore limited and appointed for payment thereof, according to the true intent and meaning of the said indenture; and also should and would, from time to time, and at all times during the said term, at their or one of their proper costs and charges, well and sufficiently repair, uphold, and keep all and singular the said messuage and dwelling-house, and premises thereby demised, and every part thereof, in, by, and with, all and all manner of needful and necessary reparations and amendments whatsoever, when and where, and as often as need or occasion should be or require; and at the end or other sooner determination of the said demise, should and would peaceably and quietly leave, surrender, and yield up unto the said *Francis Gib-*

nee; and that, after such conveyance and assignment, all the prisoner's estate shall be effectually and legally vested by relation in such assignees; and that every conveyance and assignment to the provisional assignee, and a counterpart of every such conveyance and assignment by him to such other assignees, shall be filed of record in the said Court; and that a copy of such record, made upon parchment, and purporting to have the certificate of the provisional assignee of the Court indorsed thereon, and to be sealed with the seal of the Court, shall be recognised and received as sufficient evidence of such conveyance and assignment, and of the title of the provisional and other assignees under the same, in all Courts, to all intents and purposes, without any proof whatever given of the same, or of any other proceeding in the Court, *in the matter of such prisoner's petition*. Although the 76th section was relied on for the defendants at the trial, and on which the nonsuit proceeded, and which enacts, that the proper officer of the Insolvent Debtors' Court shall, on the reasonable request of any prisoner, or of his creditors, produce and shew him or them the petition, schedule, &c. &c.; and that a copy of such petition, schedule, &c. &c. purporting to be signed by the officer in whose custody the same shall be, certifying the same to be a true copy, and sealed with the seal of the Court, shall be admitted as sufficient evidence of the same, without further proof than that the same is sealed with the seal of the Court; yet, it was not imperative on the plaintiff to produce them, to shew that he was entitled to sue as assignee, for, if all the insolvent's estate was duly conveyed to him, he had full power to sue by virtue of the 19th section of the act; and as the petition was recited in the conveyance and assignment to the plaintiff, the putting in the assignment was sufficient for the purposes of this action, as he did not stand in the situation of the insolvent, or a creditor requiring the production of the petition, or any other pro-

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by became and were possessed of the said reversion; and although the said *Francis Gibbons*, in his life-time, and the plaintiffs, since they became so possessed as aforesaid, have always, from the time of making the said indenture, hitherto well and truly performed, fulfilled, and kept all things in the said indenture contained on their parts and behalves to be performed, fulfilled and kept, according to the tenor and effect, true intent and meaning of the said indenture, yet, protesting that the defendant hath not performed, fulfilled, or kept any thing in the said indenture contained on his part and behalf to be performed, fulfilled, and kept, according to the true intent and meaning thereof; the plaintiffs, in fact, say, that the said *George Grain* and the defendant have not, nor hath either of them, paid the rent aforesaid for the two last half years of the said term elapsed on the 29th day of *September*, in the year 1827, or any part thereof; but the same is still wholly in arrear and unpaid, contrary to the said covenant of the defendant in that behalf. And the plaintiffs further say, that, after making of the said indenture, to wit, on the said 18th *July*, 1827, and from thenceforth until and at the time of the commencement of this suit, the defendant and the said *George Grain* suffered and permitted the said messuage or dwelling-house and premises to be and continue, and the same were, for and during all that time, in every part thereof ruinous, prostrate, broken to pieces, fallen down, and in great decay for want of needful and necessary repairing, upholding, supporting, maintaining, and keeping the same, contrary to the covenant of the defendant in that behalf. And the plaintiffs further say, that, by reason of the said *George Grain* not paying the said rent for the two last half years of the said term, and suffering the said messuage, or dwelling-house, and premises to be out of repair as aforesaid, the plaintiffs have sustained and been put to loss and damage to a large amount, to wit, to the amount

of 500*l.*; and the defendant hath not saved, defended, kept harmless, and indemnified the plaintiffs from such loss and damage, but hath hitherto wholly neglected and refused so to do, contrary to his said covenant in that behalf.

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To this declaration the defendant pleaded, that the said *George Grain* in the said indenture in the said declaration mentioned, before, and at and after the making of the said indenture in the said declaration above mentioned, to wit, on the 26th day of *May*, 1827, and from thence continually, until the suing out the commission of bankrupt hereinafter mentioned, was a hatter, and during all that time did use and exercise the trade of a hatter, by way of bargaining, exchanging, bartering, and chevisance, and sought his trade of living by buying and selling, to wit, at &c., and the said *George Grain*, so using and exercising the trade of a hatter, and seeking his trade of living as aforesaid, afterwards, to wit, on the 31st *May*, 1827, aforesaid, at &c. aforesaid, he the said *George Grain* became and was indebted to one *Edward Womersley*, a subject of this realm, in the sum of 80*l.* 11*s.* 6*d.*, of lawful money, &c., for a true and just debt due and owing from the said *George Grain* to the said *Edward Womersley*; and the said *George Grain* was then and there also indebted to one *James Knott*, a subject of this realm, in a certain other large sum of money, to wit, the sum of 70*l.* 8*s.* 5*d.*, of like lawful money, for a true and just debt due and owing from the said *George Grain* to the said *James Knott*; and the said *George Grain* was then and there also indebted to divers other persons in divers other large sums of money; and the said *George Grain*, being so indebted as aforesaid, and being a subject of this realm, and so using and exercising the business of a hatter, and seeking his trade of living as aforesaid, afterwards, and after the making the said indenture in the said declaration mentioned, to wit, on the same day and year last

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aforesaid, the said debts to the said *Edward Womersley* and the said *James Knott*, and also the said other debts being then and there due and unpaid and unsatisfied, became and was bankrupt within the true intent and meaning of the statute then and still in force concerning bankrupts made and provided; and that thereupon, afterwards, to wit, on the 26th *June*, 1827, aforesaid, a certain commission of bankrupt, under the Great Seal of the united kingdom of *Great Britain* and *Ireland*, bearing date at *Westminster*, on a certain day and year, to wit, the day and year last aforesaid, grounded upon the said statute, upon the petition of the said *Edward Womersley* and *James Knott*, was duly awarded and issued against the said *George Grain*, directed to certain commissioners therein named, [here the commission was set out], by virtue of which said commission, and by force of the statute concerning bankrupts, the major part of the said commissioners named in the said commission, having severally and respectively duly taken the oath prescribed and appointed to be taken by commissioners of bankrupts, according to the form of the statute in that case made and provided, and having then and there entered and kept a memorandum thereof among the proceedings in the said commission, afterwards, to wit, on the 2nd *July*, 1827, aforesaid, did, in due form of law, find that the said *George Grain* had become bankrupt within the true intent and meaning of the statute made and then in force concerning bankrupts before the date and issuing forth of the said commission, and did then and there declare and adjudge him bankrupt accordingly. The defendant then averred, that, at the time the said *George Grain* became and was bankrupt as aforesaid, he, the said *George Grain*, was entitled to the said lease in the said declaration mentioned, and that the said rent in the said declaration mentioned, and every part thereof (if any such be in arrear), became due, and was in arrear and accrued; and also, that the com-

mitting the said supposed breaches of covenant in the said declaration assigned, (if any such there be), was committed and made after the date of the said commission, to wit, on the 1st *July*, 1827. The defendant then averred, that, after the said *George Grain* became and was bankrupt, as aforesaid, to wit, on the 21st *July*, 1827, *Elliott Taylor* and *Edward Womersley*, being then and there the assignees duly appointed of the estate and effects of the said *George Grain*, as such bankrupt as aforesaid, declined the said lease; of which the said *George Grain*, so being such bankrupt as aforesaid, afterwards, to wit, on the day and year last aforesaid, had notice, and thereupon the said *George Grain*, being such bankrupt as aforesaid, afterwards, and after the death of the said *Francis Gibbons*, to wit, on the same day and year last aforesaid, and within fourteen days next after he the said *George Grain*, being such bankrupt, had notice that the said assignees had declined the said lease as aforesaid, delivered up such lease to the plaintiffs as executors as aforesaid. And this, &c., wherefore, &c.

There was a second plea, in which the above facts were set out more concisely.

Replication—That the plaintiffs, by reason of any thing in those pleas alleged, ought not to be barred from having and maintaining their aforesaid action thereof against the defendant, because they said that the delivering up of the said lease was after the said 21st day of *July* in the year 1827, aforesaid, and after the said several breaches of covenant, and every of them had accrued. And this, &c., wherefore, &c.

To this replication the defendant demurred generally, and the plaintiffs joined in demurrer.

The cause came on for argument on a former day in this Term.

Mr. Serjeant *Wilde*, in support of the demurrer.—The replication is bad in substance, and puts an immaterial

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fact in issue. The commission against *Grain* is dated on the 26th *June*, 1827, and the pleas allege, that the breaches were committed after the date of the commission. This the plaintiffs do not deny in their replication, but merely aver, that the lease was delivered up after the breaches had accrued. The question then is, whether the defendant is liable in respect of breaches of covenant, which accrued after the date of the commission against *Grain*, but before the delivery of the lease by him to the plaintiffs as executors of *Gibbons*, the original lessor? The facts set out by the defendant in his pleas furnish a complete answer to the plaintiffs' right of action against him. He was not the tenant or occupier of the demised premises, but entered into a joint covenant with the bankrupt, who was the sole lessee, and for whom the defendant was a mere surety. The statute 6 *Geo.* 4, c. 16, s. 75, enacts, "That any bankrupt entitled to any lease, or agreement for a lease, if the assignees accept the same, shall not be liable to pay any rent accruing after the date of the commission, or to be sued in respect of any subsequent non-observance or non-performance of the conditions, covenants, or agreements therein contained [and if the assignees decline the same, shall not be liable as aforesaid, in case he deliver up such lease or agreement to the lessor, or such person agreeing to grant a lease, within fourteen days after he shall have had notice that the assignees shall have declined as aforesaid (a)], and if the assignees shall not (upon being thereto required), elect whether they will accept or decline such lease, or agreement for a lease, the lessor or person so agreeing as aforesaid, or any person entitled under such lessor or person so agreeing, shall be entitled to apply by petition to the Lord Chancellor, who may order them so to elect and deliver up such lease or agreement, in case they shall decline the same, and the possession of the premises; or may

(a). The clause between brackets is a new provision.

make such other order therein as he shall think fit." Here, the defendant has alleged, that, after the assignees had declined to accept the lease, the bankrupt, within fourteen days after he had notice thereof, delivered it up to the plaintiffs as the executors of the lessor. The object of the Legislature was to discharge the bankrupt absolutely, and at all events, by his delivering up the lease to his lessor, within the stipulated period; and in *Doe d. Cheere v. Smith (a)*, where a lessee covenanted not to assign, and became bankrupt, and his assignees accepted the lease, the Court held, that his covenant was discharged by the statute 49 Geo. 3, c. 121, s. 19, although a breach of it had become impossible, by reason that he had no longer the subject matter respecting which the covenant was made, and, therefore, that if he came in again as assignee of his assignees, he should not be charged with that covenant, and that it was no breach if he assigned: and Lord Chief Justice *Gibbs*, said, "the question is, whether the Legislature has not used such extensive words, as to put an end to all covenants of the lessee whatsoever; and we are of opinion that they have. The words are, 'that he shall not be liable to be in any manner sued in respect or by reason of any subsequent non-observance or non-performance of the conditions, covenants, or agreements therein contained.' This is an *express* *absolution* of the lessee from all the covenants contained in the lease, after the assignees shall have taken possession of the lease." The same words are introduced in the 75th section of the 6 Geo. 4, with the additional proviso, that if the assignees decline to accept the lease, the bankrupt shall not be liable if he deliver it up to the lessor within fourteen days after he shall have had notice that the assignees have declined to accept it. Now, the bankrupt would not be absolutely discharged, if he could be charged circuitously by a demand made on his surety. But the de-

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(a) 5 Taunt. 795, S. C. 1 Marsh. 359.

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livering up the lease to the lessor by the bankrupt, within fourteen days from the date of the commission, operates as a surrender and extinguishment of the term, which surrender, by law, has relation to the date of the commission. The Legislature could not have meant that the lessee should be discharged from his covenants, and that the lessor was still to be bound by his grant, or that he should be excluded his right of possession, or deprived of the fruits to be derived from the enjoyment of the land. If assignees decline to take a lease, the lessor, and not the bankrupt, may petition the Lord Chancellor, who may compel them to make their election. The moment the commission issued against *Grain*, his interest was absolutely determined, the term was at an end, and when his assignees declined to accept the lease, the lessor had a right to resume possession, and grant a new lease. It is possible that the framer of the act might not have contemplated the case of a surety who becomes bound for the lessee in the same instrument; but if the principal be discharged, *a fortiori*, the surety is discharged also; and it is quite clear, that, as far as regards the former, he is discharged from the performance of each and all the covenants in the lease, from the date of the commission, and, *eo instanti*, the contemporaneous title of his landlord accrues. Here, no bond or separate instrument was given by the defendant for the performance of the covenants by the lessee in case he should become bankrupt;—both were bound by one and the same lease: both were jointly liable, and the defendant can only be chargeable in respect of that instrument; and when his principal was discharged, his liability altogether ceased. Although, in *Inglis v. Macdougall* (a), where a surety entered into a bond with his principal, which bond was conditioned for the performance of certain covenants contained in an agreement for a lease, it

(a) 1 B. Moore, 196.

was held that the surety was still liable, although his principal became bankrupt, and was discharged under the statute 49 *Geo. 3*, c. 121, yet, in that case, no lease was executed between the parties, but the covenants were contained in an agreement, which was collateral or preparatory to a lease. But the ground on which the defendant in this case is discharged, is, that the lessee's term ceased on the day the commission of bankrupt was sued out against him, and the defendant, as his surety, cannot be liable for breaches of covenant accruing between that day, and the delivery up of the lease by the bankrupt to the plaintiffs as executors of the lessor, within the time prescribed by the statute.

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Mr. Serjeant *Stephen*, *contra*.—The question in this case has been virtually decided by that of *Inglis v. Macdougall*, where this Court held, that a surety for the performance of covenants contained in an agreement for a lease, remained liable, notwithstanding his principal had become bankrupt and been discharged under the 49 *Geo. 3*, c. 121. The language of the 19th section of that statute is, in spirit, and nearly in words, the same as that of the 75th section of the 6 *Geo. 4*. That clause contains an additional proviso, that, if the assignees decline the lease, the bankrupt shall not be liable in case he deliver it up to the lessor within fourteen days after the bankrupt shall have had notice that the assignees have declined to accept it. Admitting, that, if the assignees accept the lease, the bankrupt is not liable to pay rent accruing after the date of the commission, or to be sued for the subsequent non-performance of any of the covenants contained in the lease; yet the discharge of the lessee does not necessarily imply that the surety should be discharged also. The main, if not the sole object of the lessor in requiring a surety, may be to provide against the consequence of the insolvency or bankruptcy of the lessee. If not, the party requiring the surety would be placed in no better situation than if he had only

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the security of the lessee himself. Although it may be said, that the discharge of the bankrupt enures to discharge all persons subject to the performance of the same covenants, yet the same argument might have been urged in *Inglis v. Macdougall*; and although, according to the case of *Doe d. Cheere v. Smith*, it was held, that the statute 49 Geo. 3 operates as a total discharge of the bankrupt from all the covenants contained in the lease, yet that only applies to a case between the lessee and lessor, but cannot affect the contingent rights and interests of third parties, or any claims which the lessor might have on sureties who are liable for a default made by the lessee in payment of rent or non-performance of covenants. Although it has been contended, that the term is extinguished by the delivery of the lease to the plaintiffs within the time prescribed by the statute, yet the delivery was only required for the protection of the lessor and lessee alone, and the Legislature did not look to the rights of others, or contemplate the case of a surety, as the statute is altogether silent as to the surrender or extinguishment of the term. Again, it has been said, that the delivering up the lease by the bankrupt must have a retrospective operation, *vis.* as a surrender of the term by relation from the date of the commission, but there is no ground for such a proposition. A surrender can only operate from the day of its date. There might have been a long interval between the suing out of the commission and the assignees finally declining to accept the lease; and, until they made their election, the term vested in the bankrupt, and the effect of the assignment, was suspended. A surety in a lease must be considered as standing in the same situation as a surety in an annuity deed, as far as regards payments accruing due after the date of the commission; and, in *Welsh v. Welsh* (a), it was decided, that a surety in an annuity deed is not within the provisions of

(a) 4 Mau. & Selw. 333.

the 49 Geo. 3, c. 121, and consequently that he is not discharged by the bankruptcy and certificate of his principal. In *Copeland v. Stephens* (a), it was held, that the assignment of a bankrupt's estate under his commission does not vest a term of years in the assignees, unless they do some act to manifest their assent to the assignment, as it regards the term and their acceptance of the estate; that the estate remains in the bankrupt during the period of suspension, subject to the right of the assignees to have the land by their acceptance of the assignment, and thereby to give effect to the deed, and vest the estate in themselves. So, here, the term continued in the lessee until the delivery up of the lease to the plaintiffs as the executors of the lessor. If not, it clearly continued in him until his assignees declined to accept the lease; and it appears, on the face of the record, that the breaches for which the defendant is chargeable accrued during an interval when the term was subsisting and in the bankrupt, *viz.* before his assignees had declined to accept the lease.

Mr. Serjeant *Wilde*, in reply.—Whether a surety for a lessee was in the contemplation of the Legislature or not, at the time the statute 6 Geo. 4, was passed, yet, considering the nature of the contract into which the present defendant has entered, he is, at all events, discharged. His liability only continued during the term for which the lease was granted, and when the lease was delivered up his obligation was at an end. The object of the statute was to discharge the lessee absolutely, and at all events, by the delivery of the lease to the lessor, in case the assignees declined to accept it; and it follows, that when he is discharged, the surety is discharged also, as he would have been, in case there had been an actual surrender. The consideration for the suretyship was the existence of

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(a) 1 Barn. & Ald. 593.

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the term, during which the tenant enjoyed the fruits to be derived from the estate, and by which the rent of the landlord was satisfied. In *Inglis v. Macdougall*, the liability of the surety arose on a bond which was a distinct and separate instrument:—besides, in that case there was no lease, but only an agreement for a lease. Here, however, the lease, after the assignees declined to accept it, was delivered up to the representatives of the lessor, within the time pointed out by the statute; and when it was given up, it had relation to the date of the commission. A surety in an annuity bond cannot be assimilated to a surety in a lease, who can only be liable for the payment of rent or performance of covenants by the lessee during the existence of the term. The case of *Copeland v. Stephens* is also distinguishable from the present, as here the assignees declined to accept the lease according to the power given them by the 6 Geo. 4; and as the lessee was discharged from his covenants on the day the commission of bankrupt was issued against him, so was the defendant as his surety, as he was only jointly liable with his principal during the continuance of the term granted by the lease; and when that was determined, the responsibility of the surety was at an end; the facts therefore, as set out in the first plea, are a sufficient answer to the plaintiff's right of action.

Cur. adv. vult.

Lord Chief Justice TINDAL now delivered the judgment of the Court as follows:—

The question in this case is, whether a surety for a lessee is liable in respect of breaches of covenant which accrued after the date of a commission of bankrupt against the lessee, but before the delivery up of the lease by the bankrupt to the lessor under the provisions of the bankrupt act, 6 Geo. 4, c. 16, s. 75?

That section contemplates and provides for three cases; *first*, where the assignees accept the lease; in which case, it declares that the bankrupt shall not be liable to pay any rent accruing after the date of the commission, or to be sued in respect of any non-observance or non-performance of the covenants. *Secondly*, where the assignees decline the same; in which case, it declares that the bankrupt shall not be liable as aforesaid, in case he deliver up such lease to the lessor within fourteen days after he shall have had notice that the assignees shall have declined to accept the lease; and, *lastly*, where the assignees do not, upon request, elect, whether they will accept or decline; in which case, the Lord Chancellor has power, upon petition, to order the assignees to elect, and to deliver up the lease and possession of the premises if they decline the same.

The present case falls within the second of the provisions contained in the section above referred to; and it may be admitted, that, under the circumstances stated in the pleadings, and confessed by the demurrer, the bankrupt himself would not be liable to be sued now for the non-payment of the rent, or non-observance of the covenant to repair stated in the declaration, inasmuch as those breaches accrued subsequently to the date of the commission. But the question still arises, whether the words of the statute give any more than a *personal discharge* to the bankrupt; and whether the surety is not still liable, inasmuch as the breaches were incurred prior to the actual delivery up of the lease to the lessor?

It is contended, on the part of the defendant, that, when the lessee has delivered up the lease within the time prescribed by the statute, it operates as a surrender of the lease from the date of the commission, so that the term and interest of the lessee must be considered to have ceased from that time; and, consequently, that the surety can-

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not be held liable for any breaches after the commission, the same being breaches after the term has ceased.

We think, however, the doctrine of a surrender by relation cannot be supported by any legal analogy, or by the proper construction of the statute.

It is well settled, by the case of *Copeland v. Stephens*, that, where the assignees do nothing to shew their acceptance of a lease for years, the effect of the assignment is suspended, and the term vests in the bankrupt until they make their election. The term, therefore, having once vested in the bankrupt, must remain vested in him, until either the assignees elect to take it, or until he himself delivers it up under the provision of this section; for if it could be deemed to have been divested or extinguished from the date of the commission, it would follow, that the bankrupt, if he had been in possession during the interval, would have been so without any title from the time of the commission. And, as to the statute, it contains no words of avoidance of the lease from any antecedent time; it only declares, that in case the lessee delivers up the lease, he shall not be liable for the breach of covenants incurred after the date of the commission; and these words appear to us to import no more than a personal discharge to the lessee from his liability under the covenants by the performance of a condition subsequent. Inasmuch, however, as the liability of the surety was running at the same time, and there is nothing in the act to extend the defeasance to his case, we think it still continues until the actual delivery of the lease under the statute to the lessor.

In the case of *Inglis v. Macdougall*, the surety was held not to be discharged where the assignee had accepted the lease as part of the bankrupt's estate, though the statute 49 Geo. 3, c. 121, uses words exactly similar to those in question, *viz.* "That the bankrupt shall not be liable to pay any rent accruing after such acceptance." And we

see no reason to doubt the propriety of that construction, or to place any other upon the words of this act. Upon the whole, therefore, we think that there should be—

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TUCK
v.
FYSON.

Judgment for the plaintiffs.

WILLIAMSON v. HENLEY.

Thursday,
Nov. 26th.

THIS was an action of special *assumpsit*. The first count of the declaration stated, that theretofore, and before the making of the promise and undertaking of the defendant thereafter next mentioned, a certain person, to wit, one *George Yeaman*, had deposited in the hands of the plaintiff a large sum of foreign money, of great value, to wit, of the value of 42*l.* 15*s.* of lawful money of *Great Britain*, to wit, at *London*; that also, afterwards, and before the making of the promise and undertaking of the defendant thereafter next mentioned, the plaintiff, at the special instance and request of the defendant, had delivered to him the defendant the said sum of money of the said *George Yeaman*; that also, before the time of the making of the promise and undertaking of the defendant thereafter next mentioned, the said *George Yeaman* had threatened to commence an action at law against him, the plaintiff, for the recovery of the said sum of money, to wit, at &c., and thereupon, afterwards, to wit, on &c., at &c., in consideration that he the plaintiff, at the special instance and request of the defendant, would defend any

A declaration in *assumpsit* stated, that, in consideration that the plaintiff, at the request of the defendant, would defend any action that might be brought by *J. S.* against the plaintiff, on account of certain money which the plaintiff had delivered to the defendant, he the defendant promised to save the plaintiff harmless from the consequences of such action; that *J. S.* afterwards brought an action, and obtained judgment against the plaintiff; and that a writ of *ca. sa.* was afterwards sued out on the judgment, under which

the plaintiff was arrested and imprisoned, and was obliged to pay the sum recovered by *J. S.*, in order to procure his, the plaintiff's, discharge. The defendant took out a summons to stay proceedings on payment of the debt for which the action was brought, (the sum recovered), and costs. At the trial, the plaintiff gave no evidence of the writ of *ca. sa.*, but proved the judgment, and that he had been taken in execution and imprisoned until he paid the sum recovered by *J. S.* The Jury found a verdict for the plaintiff for the amount of that sum, and also a further sum by way of damages for the imprisonment:—*Held*, that the plaintiff was only entitled to recover the former sum, either under the special count, or on a count for money paid to the defendant's use; and the Court ordered the verdict to be reduced accordingly. *Quære*, whether the facts as set out in the special count amounted to maintenance?

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action which the said *George Yeaman* should commence against the plaintiff, for or on account of the said sum of money, he the defendant undertook, and then and thereby faithfully promised the plaintiff to save him harmless from the consequences of the said action, to wit, at &c.—The plaintiff then averred, that the said *George Yeaman*, afterwards, and before the commencement of this suit, to wit, on &c., at &c., did bring, commence, and prosecute an action against him the plaintiff, in the Court of *King's Bench*, at *Westminster*, for the recovery of the said sum of money; whereof the defendant, afterwards, to wit, on &c., at &c., had notice; and although the plaintiff did, with the privity and consent of the defendant, and to the best of his ability and power, defend the said action or suit, yet the plaintiff in fact further said, that such proceedings were afterwards had in the said suit, to wit, at &c.; that the said *George Yeaman*, afterwards, and before the exhibiting of the bill of the plaintiff against the defendant, to wit, in *Easter Term*, in the ninth year of the reign of our lord the now King, in and by the consideration and judgment of the said Court, recovered and obtained against the plaintiff in the said Court, in the aforesaid action, at the suit of him the said *George Yeaman*, damages to a large amount, to wit, the amount of 4*l.* 1*s.*, to wit, at &c., and that afterwards, to wit, on &c., a certain writ of our said lord the King, called a *capias ad satisfaciendum*, issued out of the said Court of *King's Bench* upon the said judgment, directed to the Sheriffs of *London*, by which said writ, our said lord the King commanded the said Sheriffs, that they should take the plaintiff if he should be found in their bailiwick, and him safely keep, so that the said Sheriffs might have his body before our lord the King, at *Westminster*, on *Friday* next after the morrow of the *Holy Trinity*, to satisfy the said *George Yeaman* the damages aforesaid, in form aforesaid recovered; and that the said Sheriffs should then

have there that writ; that afterwards, to wit, on &c., the plaintiff was taken and arrested by his body, under and by virtue of the said writ of *capias ad satisfaciendum*, at the suit of the said *George Yeaman*, and was kept and detained in custody and imprisoned at his suit, under and by virtue of the said writ, for a long space of time, to wit, from thence until &c., when the plaintiff, in order to procure his discharge from the said imprisonment, was forced and obliged, and did necessarily lay out and expend divers large sums of money, in the whole amounting to a large sum of money, to wit, the sum of 42*l.* 15*s.*, so recovered by the said *George Yeaman* as aforesaid, and also the sum of 10*l.* for poundage and officer's fees, and other incidental expenses; and the plaintiff was also, by means of the premises, put to other great charges and expenses of his monies, amounting in the whole to a large sum, to wit, to the sum of 50*l.*, and was imprisoned during all the time aforesaid, and thereby, during all that time, was prevented from following his necessary business and affairs, and lost and was deprived of an opportunity of going upon a certain voyage, to wit, a voyage to the *West Indies* and back, and lost divers great gains which he might, and otherwise would have made thereby, amounting to a large sum, to wit, the sum of 200*l.*, and was and is, by means of the premises, otherwise greatly damnified, &c., &c.

The second count stated, that, on &c., at &c., in consideration that the plaintiff, at the request of the defendant, would defend a certain other action about to be brought against the plaintiff by *George Yeaman*, the defendant undertook and faithfully promised the plaintiff to indemnify and save him harmless from the consequences of such action:—that the said *George Yeaman*, afterwards, and before the commencement of this suit, to wit, on &c., did commence and prosecute the said last-mentioned action against the plaintiff in the Court of *King's Bench*; that al-

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though the plaintiff did, with the privity and concurrence of the defendant, and to the best of his the plaintiff's ability, defend such action, yet the said *George Yeaman*, by the consideration and judgment of the said Court, recovered and obtained judgment against the plaintiff in the said last-mentioned action, for 42*l.* 15*s.* That afterwards, to wit, on &c., a certain other writ of *capias ad satisfaciendum* issued out of the said Court, upon the said judgment, against the plaintiff, by virtue of which writ, he was taken and arrested by his body at the suit of the said *George Yeaman*, and imprisoned, and kept and detained in custody at his suit for a long time, to wit, until &c., when the plaintiff, in order to procure his discharge from the said imprisonment, was forced and obliged to, and did necessarily expend the sum of 42*l.* 15*s.*, so recovered by the said *George Yeaman*, and also the sum of 10*l.* for poundage, officer's fees, &c., &c.

The declaration also contained the common money counts. The defendant pleaded the general issue.

At the trial, before Lord Chief Justice *Tindal*, at *Guild-hall*, at the Sittings after the last Term, the plaintiff called a witness, (an attorney), who stated that, in 1827, he was employed by *Yeaman* to commence an action against the plaintiff *Williamson*, to recover a certain quantity of dollars which *Yeaman* claimed to be entitled to, and which he said he had placed in the plaintiff's hands. That the plaintiff and defendant met at the witness's office, and that the defendant said that he would indemnify the plaintiff, and save him harmless from all the consequences of the action, upon which the plaintiff delivered up the dollars to the defendant. The plaintiff then gave in evidence an examined copy of the judgment in the action brought against him by *Yeaman*, and a Sheriff's officer was called, who proved, that, on the 24th *May*, 1828, he took the plaintiff in execution at the suit of *Yeaman*, by virtue of a warrant directed to him in a cause of *Yea-*

man against *Williamson*. It was also proved, that the plaintiff remained in custody until the 6th *June* following, when he was discharged on payment of 4*2l.* 15*s.*, the amount of the debt, together with the costs. It was further proved, that, after the commencement of this action, the defendant's attorney took out a summons to stay the proceedings, upon payment of the above sum of 4*2l.* 15*s.*, together with costs to be taxed by the Prothonotary:—that the summons was attended before Mr. Justice *Park*, at Chambers; and that, on the plaintiff's attorney declining to accept that sum, the learned Judge refused to make any order. The plaintiff offered no evidence of the writ of *capias ad satisfaciendum* under which he was taken into custody, but proved, that, in consequence of his imprisonment at the suit of *Yeaman*, he had been deprived of an opportunity of going a voyage to the *West Indies*, from which he expected to derive a considerable benefit.

For the defendant, it was objected, that the plaintiff was not entitled to recover, as he had not proved that the writ of *ca. sa.* had been sued out against him, by virtue of which he was taken into custody, and without which there was no legal proof of his imprisonment at the suit of *Yeaman*.

His Lordship, however, thought that such proof was not necessary, as the plaintiff had shewn that he had been taken in execution and imprisoned at the suit of *Yeaman*, and that he had been obliged to pay a certain sum before he was released from his imprisonment. The Jury accordingly found a verdict for the plaintiff, damages 66*l.* 10*s.*, *viz.* 4*2l.* 15*s.* for the money paid by the plaintiff, and 23*l.* 15*s.* for the injury he had sustained in consequence of his imprisonment.

Mr. Serjeant *Russell*, on a former day in this Term, obtained a rule, calling on the plaintiff to shew cause why this verdict should not be set aside and a nonsuit entered,

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or why the damages should not be reduced to 42*l.* 15*s.*, or why the judgment should not be arrested. *First*, the plaintiff could not be entitled to recover on either of the special counts of the declaration, as he had averred that he was arrested, and kept in custody by virtue of a writ of *copias ad satisfaciendum* sued out against him at the suit of Yeaman, and that he was obliged to pay a certain sum in order to procure his discharge from such custody; and he gave no evidence whatever of the issuing of the writ, or that he was imprisoned under it, but merely that he was detained in custody until he paid a certain sum of money. Neither could the plaintiff be entitled to recover that sum under the count for money paid, but only on the contract declared on. *Secondly*, the damages must, at all events, be reduced to the sum actually paid by the plaintiff, as the alleged injury he had received by virtue of the imprisonment could only be under the writ of *ca. sa.*, of which no evidence was given; and *lastly*, the second count is bad upon the face of it, as it sets out an illegal contract amounting to maintenance, as it is alleged that in consideration that the plaintiff, at the request of the defendant, would defend an action about to be brought against the plaintiff by Yeaman, the defendant undertook to indemnify the plaintiff, and save him harmless from the consequences of such action; and that Yeaman afterwards, and before the commencement of this suit, brought an action against the plaintiff. But it does not appear that the defendant had any interest in the subject matter of that action to justify his undertaking to be responsible to the plaintiff for the consequences thereof; and, as the Jury found a general verdict for the plaintiff on the whole declaration, the damages cannot be severed; and as the second count is bad in substance, the judgment must be arrested.

Mr. Serjeant *Wilde* now shewed cause.—*First*, the

plaintiff is entitled to recover on the first count of the declaration, and it was not necessary for him to prove that the writ of *capias ad satisfaciendum* was sued out against him at the suit of *Yeaman*. The plaintiff's being taken into custody and imprisoned under the writ, was only matter of aggravation, and was alleged by way of special damage. The gist of the action was the breach of the undertaking by the defendant to indemnify the plaintiff from the consequences of the action to be brought against him by *Yeaman*; and the plaintiff averred that he had been obliged to pay a certain sum in discharge of a judgment obtained by *Yeaman* in that action and he proved the judgment and his having been taken in execution and imprisoned by virtue of such judgment, and that he was discharged on satisfying the amount of the debt and costs incurred in such action. But if the plaintiff cannot be deemed entitled to recover on the special counts, the verdict may be retained to the amount of 42*l.* 15*s.* under the count for money paid, as the defendant, by taking out a summons to stay proceedings in this action on payment to the plaintiff of that sum and costs, thereby admitted that he was indebted to the plaintiff in that sum, as money paid to his, the defendant's, use. There is, consequently, no ground for a nonsuit. *Secondly*, with respect to the reduction of damages, the Jury have severed them, and the plaintiff is entitled to retain his verdict for both sums; his imprisonment was the legal consequence of the judgment, and although he did not produce a copy of the writ of *ca. sa.*, yet the Sheriff's officer proved that he took the plaintiff in execution by virtue of a warrant directed to him in a case of *Yeaman v. Williamson*; and the plaintiff also proved that he remained in custody until the judgment was satisfied. *Lastly*, as to the motion in arrest of judgment, the plaintiff may enter up judgment on the first count of the declaration, to which no objection has

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been raised; but even if the second be bad, on the alleged ground of maintenance, yet it is sufficient after verdict; for Mr. Serjeant *Williams*, in a note to the case of *Stennel v. Hogg* (a), says, "Where there is any defect, imperfection, or omission in any pleading, whether in substance or form, which would have been a fatal objection upon demurrer; yet, if the issue joined be such as necessarily required, on the trial, proof of the facts so defectively or imperfectly stated or omitted, and without which it is not to be presumed that either the Judge would direct the Jury to give, or the Jury would have given the verdict, such defect, imperfection, or omission is cured by the verdict by the common law, or, in the phrase often used upon the occasion, such defect is not *any jeofail* after verdict;" and here, the Court will presume that it was proved at the trial that the defendant had a sufficient interest in the suit of *Yeaman v. Williamson* to justify the undertaking he gave to the plaintiff to indemnify him from the consequences of such suit.

Mr. Serjeant *Russell*, in support of his rule.—It is quite clear that the plaintiff could not be entitled to recover under the count for money paid. Although, where a person has laid out his own money for the use of another, who is primarily liable on an express or implied promise to repay such money, it may be recovered as being paid, laid out, and expended by the plaintiff to the defendant's use, yet, the mere circumstance of one person having received an advantage from the payment of money by another, is not sufficient to raise an *assumpsit* against the former, because the consent of the party, either express or implied, is absolutely necessary in order to support the action for money paid. So, where a contract arises out

(a) 1 Wms. Saund. 228, n. 1.

of a special agreement between two parties, the contract must be declared on specially; and, if the plaintiff has paid money for the defendant in pursuance of such agreement, he cannot recover on the count for money paid. In *Cooke v. Munstone* (a), Sir James Mansfield said: "I apprehend the rule to be this; where a party declares on a special contract, seeking to recover thereon, but fails in his right so to do altogether, he may recover on a general count, if the case be such, that, supposing there had been no special contract, he might still have recovered for money paid, or for work and labour done." Applying that principle to the present case, it is quite clear that the plaintiff could only be entitled to recover on the special counts; for, in *Fell on Guaranties*, it is said (b), "the mode of enforcing a contract of guarantie is, by special action upon the case:—and an action for goods sold and delivered, or bargained and sold to the defendant, or for money lent to another, is insufficient;" and here, the plaintiff sought to recover solely on the indemnity offered by the defendant to the plaintiff against the consequences that might result from the action brought against him by *Yeaman*. In *Lightfoot v. Creed* (c), the plaintiff purchased stock, which the defendant agreed to transfer on a given day, and, in consequence of a rise in the market, the loss on the sale amounted to a certain sum, which the defendant refused to pay. The plaintiff afterwards paid that sum to another broker, by whom the transfer was made, and it was held, that the plaintiff could not recover in an action for money paid, but that he should have declared specially on the contract with the defendant. The same principle was established in *Child v. Morley* (d), where it was held, that a broker who contracts with others for the sale of stock at a

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(a) 1 New Rep. 355.

Taunt. 263.

(b) 2nd edit. 135.

(d) 8 Term Rep. 610.

(c) 2 B. Moore, 255; S. C. 8

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future day, by the authority of his principal, who afterwards refuses to make good the bargain, cannot, by paying the difference to such third persons, maintain an action for money paid, on an implied *assumpsit* against his principal for the amount. Here, the plaintiff, if entitled to recover at all, could only be so on the special counts, as the money delivered by him to the defendant was not money paid to the use of the latter, but a sum paid to discharge the plaintiff from a liability which might be incurred, and which was done at the defendant's request. The mere fact of the defendant's having taken out a summons to stay the proceedings in this action, on payment of a certain sum, and the costs, cannot affect the question, as it was a mere offer of compromising the suit, and to which the plaintiff refused to accede. It is manifest, that the second count discloses an illegal contract upon the face of it, and the first count is not supported by the evidence, as the plaintiff did not prove the allegation that he was arrested and detained in custody under and by virtue of the writ of *ca. sa.* which had been sued out against him at the suit of *Yeaman*, and the whole of the averment as to the special damage the plaintiff sustained, is stated to have accrued to him by his being imprisoned under that writ. He therefore cannot be entitled to retain the verdict for the sum found by the Jury to be due to him for such imprisonment, as there was no legal proof of the writ, which was set forth in both the special counts of the declaration.

Lord Chief Justice TINDAL.—I think that the verdict ought to be abated or reduced by taking off the sum of 23*l.* 15*s.*, being the amount of the damages given by the Jury to the plaintiff, in respect of the injury which he alleged he had received in consequence of his imprisonment. There was no legal evidence of such imprisonment before the Jury; for, the plaintiff having averred that he was arrested and detained in custody, and imprisoned under

and by virtue of a writ of *capias ad respondendum*, the writ ought to have been duly proved. But I see no reason why the sum of 42*l.* 15*s.* might not be recovered under the first count. That count contains two distinct allegations—*first*, that *Yeaman* recovered a judgment against the plaintiff for 42*l.* 15*s.*, in an action at the suit of the former, from the consequences of which the defendant undertook to indemnify the plaintiff; and *secondly*, that afterwards a writ of *capias ad satisfaciendum* was sued out upon the judgment, under which writ the plaintiff was arrested and imprisoned. If either of these allegations were proved, it was sufficient to entitle the plaintiff to a verdict, especially where the Jury have severed the damages; and in this case it is quite clear that they were severable. It is therefore unnecessary for us to consider whether the plaintiff could not have recovered the sum of 42*l.* 15*s.* under the count for money paid. I am strongly inclined to think that he might, because the defendant, by taking out a summons to stay proceedings on payment of that sum, with costs, treated it as being due to the plaintiff, and it was in fact an admission that so much money had been paid by the plaintiff to the defendant's use. But, without deciding that point, we are all of opinion that this rule must be discharged, except as to reducing the damages to 42*l.* 15*s.*; and the plaintiff will of course have the verdict entered on the first count only—

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Rule discharged.

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Nov. 27th.

Where more than twelve months had elapsed after the taking of the acknowledgment of the conusors, and one of them had died, the Court would not allow a fine to pass, unless it were shewn that the heir-at-law or person beneficially interested, assented to the application.

BALL and Another, Conusors; STEPHENS and Wife, Conusees.

MR. Serjeant *Taddy* moved that this fine might pass, notwithstanding more than twelve months had elapsed since it ought to have been perfected, and *Stephens*, one of the conusors, had since died. The learned Serjeant produced an affidavit, which stated that the acknowledgment was taken by *Stephens* and his wife on the 18th September, 1828, and that *Stephens* died in the spring of 1829, without issue; that the fine was levied for the express purpose of confirming his seisin; and that it was not completed, through the mistake or negligence of the clerk of the attorney who was instructed to pass and perfect it. In *Howard v. Leath (a)*, the Court allowed a fine to pass, which ought to have been perfected six years before, on an affidavit which stated that the delay was owing to the negligence of the agent in *London*, with whom the necessary instruments for its completion had been deposited. So, in *Fitchley v. Jervis (b)*, where the documents for passing a fine were mislaid at the cursitor's office, the Court allowed it to pass, although one of the conusors was dead, and the acknowledgment was taken more than twelve months before the application was made, on the mere production of an affidavit stating the time of the death of such conusor.

Lord Chief Justice TINDAL.—I think we ought not to interfere, unless we see that the heir-at-law, or the person beneficially interested, consents to the application. The party who has now the legal title may complete it by levying another fine.

Mr. Justice PARK.—In *Fawcett v. Slingsby (c)*, where

(a) 2 B. Moore, 174. (b) 6 B. Moore, 315. (c) 7 B. Moore, 338.

the proper documents for levying a fine had been executed, but it was not completed for two years afterwards, in consequence of the negligence of the attorney by whom it ought to have been perfected, the Court refused to allow the fine to pass, but left the parties to levy another.

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BALL
Conusor;
STEVENS,
Conusec.

Mr. Justice GASELEE.—If the party who makes this application has experienced any loss or detriment, through the negligence of the attorney who ought to have seen that the fine was duly perfected, he has his remedy against him.

The learned Serjeant, therefore, took nothing by his motion (a).

(a) See *Ash and Wife*, conusors; *Gee*, conusec, *ante*, p. 602.

AFLALO v. GEORGE FOURDRINIER and MOSES ALMOSNINOS.

Friday,
Nov. 27th.

THIS was an action brought by the plaintiff, as indorsee, against the defendants, as acceptors of a bill of exchange for 300*l.*, dated on the 4th *July*, 1825, drawn by *Solomon and Moses Almosninos*, payable to their order four months after date, and indorsed by them to the plaintiff. The defendant *Fourdrinier* pleaded the general issue, and *Moses Almosninos* pleaded his bankruptcy and certificate in bar; upon which the plaintiff entered a *nolle prosequi* as to him, and proceeded to trial against *Fourdrinier* alone, who gave the plaintiff notice to prove the consideration he gave for the bill.

At the trial, before Lord Chief Justice *Tindal*, at *Guildhall*, at the Sittings after the last term, it appeared that, at

The indorsee of a bill of exchange sued two defendants (partners) on an acceptance by one of them in the name of the firm. Previously to the action, the partner who accepted the bill became bankrupt, and pleaded his certificate in bar, on which the plaintiff entered a *nolle prosequi* as to him, and proceeded to trial against the other:—*Held*, that the bank-

rupt, having released his interest in the surplus of his effects, was a competent witness for the defendant, to prove the circumstances under which he (the witness) accepted the bill.

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the time the bill was drawn, *Moses Almosninos* and *Fourdrinier* were in partnership, and that the bill was accepted by *Almosninos* in the partnership firm, and that he was also a partner with his brother, *Solomon Almosninos*, the drawer of the bill. The defence was, that *Moses Almosninos* had accepted the bill in the partnership firm of *Fourdrinier & Co.* in satisfaction of a claim by his brother *Solomon* upon him alone, or for his accommodation, and that the plaintiff was aware of that circumstance; and also that he had given no consideration for the bill. In order to prove these facts, the defendant *Fourdrinier* called *Moses Almosninos* as a witness, he having previously released his interest in the surplus of his effects; but his competency was objected to on the part of the plaintiff, on the ground that he was interested in the event of the suit. His Lordship, however, thought it most convenient to receive his testimony, and to reserve the question as to his competency for the opinion of the Court; and, on his evidence, the Jury found a verdict for the defendant.

Mr. Serjeant *Spankie*, on a former day in this Term, accordingly obtained a rule *nisi* that this verdict might be set aside, and a new trial had, on the ground that *Moses Almosninos* was not a competent witness, and that his testimony had been improperly received. He and *Fourdrinier* were joint debtors as acceptors of the bill, and both were *prima facie* liable, they being general partners at the time the bill was drawn and accepted. The case of *Moody v. King* (a) bears the nearest resemblance to the present, where *A.* and *B.*, having been in partnership, dissolved it, and, two days after the dissolution, *A.* drew a bill on *C.* in the name of the firm, which *C.* accepted and paid without consideration, and afterwards sued *A.* and *B.* for money lent. *A.* pleaded his bank-

(a) 2 Barn. & Cress. 558; S. C. 4 Dow. & Ryl. 30.

ruptcy and certificate, and *B. non assumpsit*; and a *nolle prosequi* having been entered as to *A.*, it was held that he was a competent witness for *B.* to prove that *C.* accepted the bill for his (*A.*'s) sole accommodation. There, however, the partnership between *A.* and *B.* was dissolved before the bill was drawn. It was not, therefore, as between them, a partnership transaction, and *B.* was merely a surety for *A.* within the meaning of the statute 49 Geo. 3, c. 121, s. 8, and he might have proved under *A.*'s commission. Here, however, *Fourdrinier* and *Almosninos* were joint debtors to the plaintiff, and the former was not a surety for the latter, nor could he prove under the commission against his partner for a debt incurred by both jointly. *Almosninos* remained liable to *Fourdrinier* for contribution, in the event of a verdict against the latter in this action, and therefore his testimony was inadmissible. Although in *Ex parte Taylor (a)*, a solvent partner was deemed to be entitled to prove against the estate of a bankrupt co-partner the amount of the balance due to him upon the partnership account, first satisfying the partnership debts, or indemnifying the bankrupt's estate against them; yet, there, all the partnership creditors were satisfied, and the solvent partner having paid all the joint debts, he was in the nature of a surety, and consequently entitled to prove under the commission; and in *Ex parte Ellis (b)*, it was held, that a solvent partner could not prove a debt, or even enter a claim, until all the joint debts were paid.

Mr. Serjeant *Wilde*, and Mr. Serjeant *Russell*, on a subsequent day shewed cause.—If the plaintiff had obtained a verdict for the amount of the bill, it would form an item in the partnership account between *Fourdrinier* and *Moses Almosninos*, who was one of the drawers, as well as the acceptor of the bill. If *Fourdrinier* had paid

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 ———
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(a) 2 Rosc. 175.

(b) 2 Glyn & Jam. 312.

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the bill, he might, perhaps, have proved against the separate estate. But *Fourdrinier* could not maintain an action against *Almosninos* for any part of the sum which the plaintiff sought to recover in this suit, for he having caused a *nolle prosequi* to be entered as to *Almosninos*, he was no longer under any legal liability; and if *Fourdrinier* were to sue him for contribution in an action for money paid, he could not allege that the money had been paid to the use, or at the request of *Almosninos*. Admitting, that, if one of two partners pay all the joint creditors, he may prove against the estate of his bankrupt co-partner; yet it is on the ground that the solvent partner has made an equitable distribution to all the creditors. When *Almosninos* obtained his certificate, it operated as a discharge of all claims *Fourdrinier* might have against him, and also of all the items of the partnership accounts. In the late case of *Bate v. Russell* (a), where the payees sued the makers of a promissory note, one of them pleaded his bankruptcy and certificate, it was proposed by his counsel, that a verdict should be taken for him, and that he should then be examined as a witness for the other defendants, to shew the consideration for which the note was given; and Mr. Justice *Park* directed the Jury to find a verdict for him, on his plea of bankruptcy, giving the plaintiffs leave to move to enter a verdict for them, if the Court should think the evidence inadmissible; but it does not appear that any motion was made; and here, the bankruptcy and certificate of *Almosninos* expressly discharged him, whatever the result of this action might be. Besides which, he was altogether discharged from liability, the plaintiff having entered a *nolle prosequi* on the record. Therefore, *quacunqve via data*, he was a competent witness, and his testimony was properly received.

(a) 1 Mood. & Malk. 332.

Mr. Serjeant *Spankie*, in support of his rule.—The *nolle prosequi* is only binding as between the plaintiff and *Fourdrinier*, the defendant, in this suit, and cannot affect the latter in any subsequent proceeding he may think fit to adopt against *Almosninos*. Before the statute 49 *Geo. 3* was passed, it was held, in the case of *Wright v. Hunter (a)*, that money paid by one partner to another before the bankruptcy of the latter, for the purpose of being paid over as his liquidated share of a debt to their joint creditor, having not been so applied, was proveable as a debt under the commission, and that the solvent partner might recover his share of the debt paid after the bankruptcy to the joint creditor, notwithstanding the bankrupt partner had obtained his certificate. In this case, the defendants *Fourdrinier* and *Almosninos* were jointly and *primâ facie* liable to the plaintiff, and it is quite clear that *Fourdrinier's* claim on *Almosninos* for his share of the debt, in case the plaintiff had recovered in this action, would not have been barred by the certificate. It was clearly the interest of the witness to defeat the plaintiff's demand on the defendant *Fourdrinier*, his partner, as the latter would have a right to call on him for contribution in case the plaintiff succeeded, and *Fourdrinier* had been compelled to pay the whole debt. It must be inferred, from the case of *Moody v. King*, that, if the partnership had subsisted at the time the bill was accepted, the debt could not have been proved, nor would the demand of the one partner be barred by the certificate of his bankrupt partner.

Cur. ado. vult.

Lord Chief Justice TINDAL now delivered the judgment of the Court, as follows:—

The only question in this case is, whether *Fourdrinier*, upon payment of the whole debt, would be entitled to sue

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(a) 1 East, 20.

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Messrs Almonies, as his partner, for contribution, either in law or in equity; for, if *Fourdrinier* had this right, he could not call his partner as a witness, it being his direct interest to defeat the action. Before the statute 40 Geo. 3, c. 121, s. 8, it is clear that the solvent partner who had paid a partnership debt after the date of a commission of bankrupt issued against his partner, might recover the proportion of such debt by an action at law against the bankrupt, and that his certificate would be no bar to such an action. *Wright v. Hunter* (a). The only question then is, whether, since that statute, the solvent partner, after payment of the partnership debt, though subsequently to the commission, becomes entitled to prove? For, if he can prove, he is obliged to prove, and the certificate will be a bar to any action for contribution; and the bankrupt partner is an admissible witness. Upon consideration of that act, and the cases decided thereon, we think *Fourdrinier*, after payment of this joint debt, would be allowed to prove the share paid by him for his bankrupt partner, and that the bankrupt having obtained his certificate, and released his right to any surplus, was consequently an admissible witness for the defendant. The solvent partner, if not properly a surety for his partner's share, because each is originally liable for the whole, yet may, with strict propriety, be called, as to the share belonging to his partner, a person liable for the debt of another, and in that character would be entitled to prove under the commission. And accordingly, in *Ex parte Young*, Lord Chancellor *Eldon* held, that those words were adopted in the statute for the convenient latitude of comprehending all those who could not be strictly considered as sureties, but were responsible for another's debt, and allowed the solvent partner, who had paid a debt after the commission, which the bankrupt partner had improperly

(a) 1 East, 20.

contracted in the partnership name, to prove against the bankrupt partner's estate. Such proof, indeed, would not be allowed to come in competition with the claims of the partnership creditors; but, if the debt can be proved at all, the certificate is a bar. And, in *Ex parte Smith, In re Sheath* (a), the Vice Chancellor lays down the rule even more largely, by saying: "It is now settled, that a solvent partner winding up the partnership concerns, is, under Sir Samuel Romilly's Act, to be considered as a surety paying the debt after the bankruptcy, in respect of his previous liability. Each partner is a principal debtor for his own share, and they are mutually sureties to the creditors for the share of each other;" and the case of *Wood v. Dodgson* (b) leads to the same conclusion. We think, therefore, that the witness was properly admitted, and that the rule *nisi* for setting aside the verdict, and for a new trial, must be—

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Discharged.

(a) 4 Madd. Rep. 477.

(b) 2 Mau. & Selw. 195.

IN THE EXCHEQUER CHAMBER.

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(In error).

THIS was an action of debt to recover penalties under the statute 17 Geo. 2, c. 3. The declaration alleged that

An assistant
 overseer, ap-
 pointed under
 the statute 59

Geo. 3, c. 12, is within the provisions of the statute 17 Geo. 2, c. 3, and liable to a penalty for not producing a poor-rate to the inhabitant of a parish when duly required so to do.

A count in a declaration for penalties under the statute 17 Geo. 2, c. 3, alleged that the plaintiff was an inhabitant of the parish of A., and that the defendant was the assistant overseer of that parish; that a rate for the relief of the poor was made, allowed, and published; and that, at a seasonable time, the plaintiff requested the defendant, as such assistant overseer, to permit him, the plaintiff, to inspect the rate, and tendered one shilling for the same; and that, although the defendant, as such assistant overseer, had the rate in his possession, he would not permit the plaintiff to inspect it:—*Held* (on writ of error brought) to be sufficient after verdict, because the allegation, that the defendant was assistant overseer, could only be proved by the production of the warrant for his appointment, in which his duties must be specified; and that, if he had the rate in his custody as such assistant overseer, it might be presumed that it was his duty to produce it, when its inspection by a parishioner was duly demanded.

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the plaintiff below (the defendant in error) before and at the time of the committing of the offence thereafter mentioned, was, and still is, an inhabitant of the parish of *Almondsbury*, in the county of *Gloucester*; and that before and at the time of the committing, &c., he the defendant below (the plaintiff in error) was, and still is, the assistant overseer of the poor of that parish, and that theretofore, to wit, on &c., at &c., the churchwardens and overseers of that parish made a certain rate for the relief of the poor of the said parish, which rate, so made as aforesaid, was afterwards, and before the committing, &c., allowed by two of his Majesty's Justices of the peace for the county of *Gloucester*, and duly published by the churchwardens and overseers of the poor of the said parish, and that afterwards, and at a reasonable time in that behalf, to wit, on &c., the plaintiff below requested the defendant below, as such assistant overseer of the said parish, to permit him the plaintiff below to inspect the said rate, and then and there tendered and offered to the defendant below the sum of one shilling for the same. The plaintiff below then alleged, that, although the defendant below, as such assistant overseer, then and there had the said rate in his possession; yet he did not nor would permit the plaintiff below to inspect it, whereby the defendant below forfeited for such offence the sum of 20*l.*, and whereby, and by force of the said statute, an action had accrued to the plaintiff below, being the party aggrieved, to demand, &c.

The defendant below pleaded *nil debet*, on which issue was joined. The cause was twice argued in the Court of *King's Bench*; *first*, on a motion to set aside a nonsuit, which was directed on the ground that the plaintiff below was not a party grieved within the meaning of the statute 17 *Geo.2(a)*; and, *secondly*, upon a motion in arrest of judgment, on the ground that it was not averred in the declara-

(a) 7 Barn. & Cres. 586; S. C. 2 Man. & Ryl. 482.

tion that *it was the duty* of the defendant below, as assistant overseer, to exhibit the rate to the plaintiff below when requested so to do; but the Court held, that the declaration was sufficient after verdict, and that the plaintiff was entitled to judgment. Upon which the defendant below brought a writ of error, which now came on for argument.

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Mr. Serjeant *Ludlow*, for the plaintiff in error.—An assistant overseer is not a person within the words or meaning of the statute 17 *Geo. 2*, c. 3, the second section of which enacts (a), “That the churchwardens and overseers of the poor, or other persons authorized to take care of the poor in every parish, shall permit all and every the inhabitants of the said parish, to inspect any rate for the relief of the poor, at all seasonable times, paying one shilling for the same.” And the third section enacts, “That, if any churchwarden or overseer of the poor, or other person authorized to take care of the poor in every parish, &c. shall not permit any inhabitant or parishioner to inspect the rates for the relief of the poor, such churchwarden or overseer, or other person authorized as aforesaid, for every such offence shall forfeit and pay to the party aggrieved the sum of 20*l.*, to be sued for and recovered by action of debt in any of his Majesty’s Courts of record.” At the time that statute was passed, an overseer of the poor was a public officer, the duties of whose office were well understood. But an assistant overseer was not known, and it was then illegal to pay a deputy a compensation out of the poor rates, for discharging the duties of his principal. Assistant overseers were first appointed under the statute 59 *Geo. 3*, c. 12. But they are neither churchwardens nor overseers, nor can they be considered as deputy overseers, for they do not represent the overseers in all their duties, but only

(a) 8 Barn. & Cress. 702.

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in those for the discharge of which they are specially appointed. They are not, therefore, liable to statutable penalties. The overseers whose duties and liabilities are pointed out in the 17 *Geo. 2*, are the same description of officers as were established by the 43 *Eliz. c. 2*, which statute is recited in the preamble. An assistant overseer need not be a substantial householder, nor is he appointed by magistrates in the first instance; neither is he bound to accept the office. He is nominated and elected by the parishioners in vestry assembled, who fix a yearly salary to be paid him for executing the office; and he is also required to give a bond as a security for the due performance of his duties. Although it may be said that he is a person authorized to take care of the poor, and, therefore, falls within the provisions of the 17 *Geo. 2*, yet he is not liable to the penalties imposed by that statute. The persons so authorized are guardians of the poor, or those who are authorized to make rates, but an assistant overseer has no such power. But, even admitting that he may be liable as a person authorized to take care of the poor, the declaration should have charged him in that character, and the plaintiff below should have alleged *that it was the duty of the defendant below, as assistant overseer, to produce the rate*. Although it might have been in his possession, it does not follow that he was bound to produce it. He might have been entrusted with it for the mere purpose of collecting monies to be raised under it, or he might have a temporary possession only, for instance, for the purpose of depositing it in the parish chest, or to take it to the magistrates in order to obtain warrants against those who had neglected or refused to pay the rates, or for many other legitimate purposes, excluding the duty of exhibiting it. In *Comyns's Digest* (a), it is said, if an action be founded upon a statute, the plain-

(a) Tit. "*Action upon Statute*," (A. 3); S. P. "*Pleader*," (C. 76.)

tiff must aver every matter which is requisite to entitle him to an action, in order to inform the Court that his case is within the statute:—and that applies more forcibly to a penal statute, which always receives a strict construction. Although it may be said, that every intendment will be made by the Court after verdict, yet in *Spieres v. Parker*, Mr. Justice Buller said (a), “nothing is to be presumed after verdict, but what is expressly stated in the declaration, or what is necessarily implied from those facts which are stated:”—and here, from what is alleged in the declaration, no necessary implication or intendment can be raised, that the defendant below was subject to the penalties imposed by the statute 17 Geo. 2, for not producing the rate in question. The liability attaches upon the party who has the legal custody of the rates, and not on the person who has a mere naked possession; and by the statute 58 Geo. 3, c. 69, s. 6, it is expressly enacted, that all rates and assessments, accounts and vouchers of the churchwardens, overseers of the poor, and other parish officers, shall be kept by such persons, and deposited in such place and manner, as the inhabitants in vestry assembled shall direct.” The defendant below was only described in the declaration as an assistant overseer, but the plaintiff should have gone further, and alleged the ground on which his liability arose, and also that it was his duty to produce the rate. In the case of *The King v. Everett* (b), an information stating, that one H. was employed in the service of the customs, and that it was his duty, as such person so employed, to arrest and detain certain goods, and that the defendant corruptly solicited H., being such person so employed, to forbear to arrest and detain such goods, it was held, that, inasmuch as it was not the duty of every person employed in the service of the customs, to arrest and detain goods which

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(a) 1 Term Rep. 145. (b) 8 Barn. & Cress. 114; S. C. 2 Man. & Ryl. 35.

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would be liable to seizure, the count was bad, for want of shewing that *H.* was a person whose duty it was to arrest and detain such goods; and Lord *Tenterden* there referred to the case of *Max v. Roberts* (a), where a count in a declaration alleged a shipment by the plaintiff, of goods on board the defendants' vessel, of which they were owners, but did not state that the goods were delivered to or received by the defendants, or that they had any notice of the fact of the shipment, it was held, that the count could not be sustained, as there was not any fact alleged from which the law would imply any duty in the defendants, with respect to the goods. So, here, there is no allegation that it was the duty of the defendant, as assistant overseer, to produce the rate, or that he had been duly appointed such officer; and in *Short v. Pruett* (b), in an action against a farmer of the post horse duties, under the statute 27 *Geo.* 3, c. 26, for a neglect of duty, it was held to be necessary to aver, that he was the farmer appointed under and by virtue of that act; and in the case of the *College of Physicians v. Bush* (c), a declaration upon the statute 14 *Hen.* 8, c. 5, for illegally practising physic in *Westminster*, was held bad, as it did not allege that *Westminster* was within seven miles of *London*. So here, the plaintiff has only averred, that the defendant had the rate in his possession, but not that it was his duty, as an assistant overseer, to produce it.

Mr. *Campbell*, for the defendant in error.—There is no ground to impugn the judgment of the Court below, where the same course of argument was adopted as has been now raised, and the whole Court thought the declaration sufficient; and when the case first came before them on a motion for a new trial, Mr. Justice *Holroyd*, said (d): “If it were

(a) 12 East, 89.

(b) 6 Term Rep. 163.

(c) 4 Mod. 47.

(d) 7 Barn. & Cres. 593.

the duty of the assistant overseer to do all the acts which an overseer is bound to do, then he ought to have produced the rate;" and the Court ordered the cause to go down to another Jury, in order that the nature of the duties of the defendant below might be ascertained; and, on the second trial, they found a verdict for the plaintiff below on those counts which charged the defendant as assistant overseer. If such officer be held not liable to penalties for not producing the rate, the statute 17 *Geo. 2*, would be in effect repealed; for, if he be not punishable for refusing to produce it, and the overseer may excuse himself by saying that the rate is not in his possession, the parishioner requiring to look at it would be altogether without remedy. But the main question now is, whether it sufficiently appears on the face of the declaration, that it was the duty of the defendant below to shew the rate to the plaintiff below, when he requested to inspect it. An assistant overseer, when duly appointed under the 59 *Geo. 3*, although he is not an overseer for all purposes, yet he is authorized to execute all such of the duties of overseer as shall in the warrant for his appointment be expressed; and, though it is not alleged that it was the defendant's duty to exhibit the rate, yet it is averred that he was assistant overseer, and as such assistant overseer had the rate in his possession: but he could not have had it in his custody as assistant overseer, unless it had been specified in his warrant of appointment that he should have it. Besides, the plaintiff alleged that his request to inspect the rate was made at a seasonable time, so as to bring the refusal within the second section of the statute 17 *Geo. 2*. Although it has been said that the rate-book might have been delivered to the defendant for a particular purpose only, *vis.* for collecting the rates, or taking the book to the magistrates, in case of default made in payment of the rates; yet the Court must infer, after verdict, that the defendant was proved to be such an officer, that it was his duty to produce the rate to the plaintiff when duly required so to do. In the case of the *King v. Everett*, there

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was an entire absence of all circumstances or facts from which any duty could be inferred to render the party charged liable. Besides, that was a proceeding of a criminal nature, and the allegation that it was the duty of the defendant to seize goods, was matter of law, and, being so, the fact shewing the legal duty should have been stated and alleged. So, in *Max v. Roberts*, from the facts stated in the declaration, no duty was imposed on the defendant to convey the goods. Here, however, the statute 17 *Geo. 2*, gives a right to every inhabitant of a parish to inspect the rates; and, if the overseer, or any person authorized to take care of the poor, and who, by virtue of his office, is entitled to the custody of the rate, refuses such inspection, he is liable to the penalties imposed by the act; and here, as it is alleged that the defendant was an assistant overseer, and as such had the rate in his possession, it must be assumed that he was entitled to have it in his custody as such overseer, and, therefore, that he was bound to produce it to the plaintiff, a parishioner, on his being requested to do so at a seasonable time.

Mr. Serjeant *Ludlow*, in reply.—The Court below were far from being satisfied that the count in question was sufficient; for, Mr. Justice *Bayley* said: "I am of opinion, that, after verdict, the plaintiff is entitled to recover, although the count is certainly *very imperfect* in form." Mr. Justice *Littleton* observed, that "there was only just sufficient on the record to turn the scale against the defendant;" and Mr. Justice *Park* added: "There is just sufficient on the record to warrant a judgment for the plaintiff." The main distinction was not there taken, as to the party who is entitled to the legal custody of the rate books. The assistant overseer cannot be deemed liable to the penalties imposed by the statute 17 *Geo. 2*, if he has only a bare or limited right of possession, and the plaintiff should at least have alleged that it was *the duty of the defendant* to allow the plaintiff to inspect the rate;

whereas, he has only stated that it was in the possession of the defendant: for, as Mr. Justice *Littledale* said, "The duties of an assistant overseer are certainly undefined, nor can we tell correctly what they are, without seeing the warrant by which he is appointed. The rate book might be delivered to him for the purpose of collecting the rate only, but then the plaintiff must have been nonsuited." On the whole, therefore, there is sufficient to authorize this Court to say that the count in question is insufficient, and cannot be supported.

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Lord Chief Justice TINDAL now delivered the judgment of the Court, as follows:—This case is brought before us by a writ of error from the Court of *King's Bench*. Two objections have been raised—*First*, that an assistant overseer is not within the provisions of the statute 17 *Geo.* 2, c. 3, s. 3, which imposes a penalty of 20*l.* upon overseers not permitting inhabitants of a parish to inspect the poor-rate, when properly required so to do;—and *secondly*, that even if, in point of law, such assistant overseer is subject to the penalty, enough has not been set forth on the face of this record to make the defendant below liable, as the declaration does not allege *that it was his duty to produce the rate*. But we are of opinion that neither of these objections can prevail, and that the judgment of the Court of *King's Bench* ought to be affirmed. *First*, the words of the 3rd section of the statute 17 *Geo.* 2, imposing the penalty for not permitting an inhabitant to inspect the rates, are, "That, if any churchwarden or overseer of the poor, or other person authorized as aforesaid (that is, authorized to take care of the poor (a)), shall not permit any inhabitant or parishioner to inspect the poor-rates, or shall refuse or neglect to give copies thereof as aforesaid (that is, at all seasonable times, on payment of one shilling for the same (b)), such churchwarden or overseer,

(a) See section 1.

(b) See section 2.

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or other person authorized as aforesaid, for every such offence, shall forfeit and pay to the party aggrieved the sum of 20*l.*, to be sued for and recovered by action of debt, bill, plaint, or information, in any of his Majesty's Courts of record. It has been contended, that an assistant overseer does not fall within this section, as he is not designated therein as a person authorized to take care of the poor, or classed with the other officers therein named, as he is neither a churchwarden nor overseer of the poor. But, admitting that he is not, still he is a person authorized to take care of the poor; for he must have been nominated and elected by the inhabitants of the parish in vestry assembled, and appointed an assistant overseer by warrant in writing under the hands and seals of two Justices of the Peace, as required by the statute 59 *Geo. 3*, c. 12, s. 7, which enacts, that it shall be lawful for the inhabitants of any parish in vestry assembled, to nominate and elect any discreet person or persons to be assistant overseer or overseers of the poor of such parish, and to determine and specify the duties to be by him or them executed and performed, and to fix such yearly salary for the execution of the said office as shall, by such inhabitants in vestry, be thought fit; and it shall be lawful for any two of his Majesty's Justices of the Peace, and they are thereby empowered, by warrant under their hands and seals, to appoint any person or persons who shall be so nominated and elected, to be assistant overseer or overseers of the poor, for such purposes and with such salary as shall have been fixed by the inhabitants in vestry; and every person to be so appointed assistant overseer, shall be authorized and empowered to execute all such of the duties of the office of overseer of the poor as shall in the warrant for his appointment be expressed, in like manner, and as fully, to all intents and purposes, as the same may be executed by any ordinary overseer of the poor." An assistant overseer, therefore, although he may not be expressly authorized to take care of the poor, yet a sufficient authority is given him to execute all such of the

duties of the office of overseer as shall be expressed in the warrant for his appointment. The second section of the statute 17 *Geo. 2*, enacts, "That the churchwardens and overseers of the poor, or *other persons authorized to take care of the poor*, shall permit all and every the inhabitants of the parish to inspect the rates for the relief of the poor, at all seasonable times, paying one shilling for the same." It appears to us, that an assistant overseer, duly appointed, falls within the terms and meaning of that section, as being a person authorized to take care of the poor; for, it would be giving the act a very narrow construction, if we were to hold that it extended only to those parochial officers who were then in existence. Although that statute cannot be intended to have a prospective view or operation, because assistant overseers were not then known, still the Legislature have since created officers who fall within the description of those persons who are authorized to take care of the poor. The 59 *Geo. 3*, is a remedial act, and passed for the benefit of the public and the relief of the poor.

But it has been said, that, admitting that an assistant overseer is within the provisions of the 17 *Geo. 2*, still, that it does not appear upon the face of this record that it was *his duty, as such assistant overseer*, to have the custody of the poor rates, so as to make him liable to the penalty for not producing a rate to an inhabitant of the parish, when called upon so to do. Although this objection might have prevailed if taken on demurrer, yet the finding of the Jury has established that the plaintiff below had a right to demand the rate; and it must be now intended that the defendant was a person who was entitled to have the custody of it, and that he had been duly appointed assistant overseer by the warrant of the magistrates, in compliance with the terms of the statute 59 *Geo. 3*. There is an express allegation in the count before us, that the defendant was an assistant overseer, and that could only have been proved at the trial by the production

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of the warrant by which he was appointed, in writing, under the hands and seals of the Justices, or, if the warrant could not be procured, by giving secondary evidence of its contents. The Judge, therefore, having the warrant of the defendant's appointment before him, unless it appeared upon the face of it that he was a person authorized to take care of the poor, would have told the Jury that he did not fall within the terms of the statute 53 Geo. 3, by which he was authorized to execute all such duties as should in the warrant be expressed, as fully as the same might be executed by any ordinary overseer of the poor. It is further alleged, that the plaintiff requested the defendant, as such assistant overseer, to permit him to inspect the rate, and that, although the defendant, as such overseer, had the rate in his possession or custody, yet, that he would not permit the plaintiff to inspect it. If the defendant had not a general authority to take care of the poor at large, yet he might have a limited authority, a portion of which was for him to have the care and custody of the rate-book, and a penalty is sought to be enforced for a breach of the execution of his duty, as such overseer, in not allowing the plaintiff, an inhabitant of the parish, to inspect it. We are therefore of opinion, that, after verdict, sufficient appears upon this count for us to assume that the defendant was a person authorized to have the care of the poor, within the meaning of the statute 17 Geo. 2, or that it was his duty, as assistant overseer, to have the care and custody of the rate-books. If the declaration had alleged that the defendant had authority to take care of the poor, there could have been no doubt; and although his right, as assistant overseer, to have the care and custody of the rate is ambiguously expressed, still the Judge must have seen at the trial whether he had the legal custody of it or not; and, after verdict, we are not to intend that the defendant, as assistant overseer, was not entitled, as such officer, to have the care and custody of the rate-books. The case of *The King v. Everett* is

altogether distinguishable from the present, as there only three classes or descriptions of persons were authorized to seize goods under a warrant from the officers of the customs, and the seizure was made by a person not falling within either of these descriptions: there, too, the defendant was charged with the commission of a crime; whilst here, he only rendered himself liable to a penalty to be enforced by civil remedy. We are therefore unanimously of opinion, that the judgment of the Court below must be—

Affirmed.

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Mr. *Campbell* then moved, that the judgment in *Parker v. Edwards*, on which a writ of error had also been brought, might be affirmed. There, a demand to inspect the rate had been made by another parishioner, upon the defendant on his own premises, not far from his house, and he refused to allow the inspection, but not on the ground that it was inconvenient to go to his house for that purpose; and, in an action against him for the refusal, the Court of *King's Bench* held that this was a reasonable demand.

Judgment affirmed accordingly.

REGULÆ GENERALES.

BAIL.

LORD Chief Justice *Tindal*, in the course of the Term, Bail. said, that doubts having been frequently entertained whether or not leaseholders could be admitted to justify as bail, the Judges of the respective Courts had conferred together, and come to the determination, that, in future, no bail should be allowed to justify, unless he be a housekeeper or a freeholder.

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Annuities.

ANNUITIES.

IT IS ORDERED, that, in future, where a rule to shew cause is obtained in this Court, for the purpose of setting aside an annuity or annuities, the several objections thereto intended to be insisted upon by the counsel at the time of making such rule absolute, shall be stated in the said rule to shew cause.

N. C. TINDAL.

J. A. PARK.

J. BURROUGH.

S. GASELEE.

AWARDS.

Awards.

IT IS ORDERED, that, in future, where a rule to shew cause is obtained in this Court, to set aside an award, the several objections thereto intended to be insisted upon at the time of making such rule absolute, shall be stated in the rule to shew cause.

N. C. TINDAL.

J. A. PARK.

J. BURROUGH.

S. GASELEE.

END OF MICHAELMAS TERM.

AN
I N D E X
TO THE
PRINCIPAL MATTERS.

◆

ACCOUNT STATED.

1. "Received of *A. B.* 150*l.* which I promise to pay on demand, with interest," is a promissory note, and requires to be stamped as such. Where, therefore, an instrument in these words, on being produced in evidence, was stamped with a receipt stamp:—*Held*, that an acknowledgment by the defendant, that he owed the party to whom it was given the sum mentioned in the note, was held sufficient to entitle the executors of the latter to recover on an account stated, although the consideration for which the note was given was goods sold and delivered, for which there was no count in the declaration. *Ashby v. Ashby*, 186

ACKNOWLEDGMENT.

See FINES AND RECOVERIES, 3.

ACTION ON THE CASE.

See CORPORATION, 1.

1. Where a person manufactures an article and sells it for a particular purpose, the law implies a warranty that it is fit and proper for that purpose. Therefore, where the defendant supplied copper sheathing for the plaintiff's vessel, which turned out to be defective in a short time after it was used, and the Jury found that the decay was occasioned by some intrinsic defect in the quality:—*Held*,

ACTION ON THE CASE.

that the plaintiff was entitled to recover damages in an action on the case in the nature of deceit, although no fraud was imputed to the defendant; for that, as he manufactured the copper, and knew the purpose to which it was to be applied, and said, "he would supply the plaintiff well," it amounted to a warranty that it should be fit for that purpose. *Jones v. Bright*, 155

2. In an action on the case for maliciously indicting the plaintiff for perjury, malice and a want of probable cause in the defendant must concur; and the plaintiff must adduce some evidence to shew a want of probable cause, before he can call upon the defendant to prove the affirmative, and shew that he had reasonable and probable cause. Where, therefore, the defendant indicted the plaintiff for perjury, but, as he did not appear before the Grand Jury, the bill was ignored, and he afterwards preferred another indictment, and the bill was found on his testimony, and on which he caused the plaintiff to be apprehended, and opposed his bail, and suspended all proceedings on the indictment for three years, and the plaintiff took the record down to trial, at which the defendant was present, but left the Court just before he was called as a witness for the prosecution; and the

Jury, after deliberation, acquitted the plaintiff:—*Held*, that this was sufficient *prima facie* evidence of a want of probable cause; but the Judge having thought otherwise, and directed a nonsuit—the Court set it aside, and ordered a new trial. *Willans v. Taylor*, 350

3. *Quære*—Whether the assignee of an insolvent can maintain an action on the case against an attorney for negligence in preparing a lease for the insolvent, whereby his estate was lessened in value and damaged? *De-lafield v. Freeman*, 704

ADMISSIONS.

1. In an action of trover by the assignees of a bankrupt, the defendant's attorney admitted that the party had been *duly declared* bankrupt:—*Held*, that the defendant was thereby precluded from objecting to any of the proceedings under the commission, unless he had given notice to dispute it. *Perring v. Tucker*, 557

ADULTERY.

See HUSBAND AND WIFE.

AFFIDAVIT.

1. If an affidavit be sworn by two or more deponents, their names must be written in the *jurat*. *Houlden v. Fasson*, 559

AFFIDAVIT TO HOLD TO BAIL.

1. An affidavit of debt, stating that the defendant was indebted to the plaintiff in a certain sum for goods sold and delivered to the defendant, and at his request, is insufficient, as it is necessary to allege that the goods were sold and delivered by the plaintiff to the defendant. *Snell v. Anderton*, 269

2. An affidavit of debt made by

ARBITRATION.

the plaintiff, stated that the defendant was indebted to him in the sum of £25*l*. upon a bill of exchange drawn by *M. J. D.* upon and accepted by the defendant, and indorsed by *M. J. D.* to the plaintiff, and due at a day then past:—*Held*, sufficient, although it did not state that the bill was payable to *M. J. D.*, or his order, because, if the plaintiff had no interest in the bill, perjury might be assigned on the affidavit. *Hughes v. Brett*, 566

AGREEMENT.

See ASSUMPSIT.

LIQUIDATED DAMAGES.

ALIMONY.

See HUSBAND AND WIFE, 1.

ALLOTMENT.

See INCLOSURE-ACT.

ALTERATION.

See BOND.

AMENDMENT.

See PRACTICE, 14.

1. Where the defendant died after the execution of a writ of *feri facias*, the Court would not allow it to be amended by inserting the *testatum* clause, as the interest of the personal representative might be affected by such insertion. *Phillips v. Tanner*, 562

ARBITRATION.

1. Where all matters in difference between the plaintiff and defendant were referred to an arbitrator, and the defendant made several claims against the plaintiff, which might be the subject of a cross action, and the arbitrator found that the plaintiff had no cause of action against the defendant:—*Held*, that the award was suf-

ficient—all matters in difference between the parties having been referred. *Hayllar v. Ellis*, 553

2. By a Judge's order, all matters in difference in a cause were referred to an arbitrator, so as he should make his award in writing on or before the first day of *Trinity* Term then next, or on or before such further or ulterior day as he should appoint and signify in writing under his hand, to be indorsed on the order. The arbitrator enlarged the time by indorsement upon the order, and, before the expiration of the enlarged time, the plaintiff's attorney, at the request of the arbitrator, obtained a Judge's order for a further enlargement. The defendant attended a meeting appointed by the arbitrator in pursuance of such order; but the plaintiff sent an excuse for his non-attendance. The arbitrator afterwards made his award, but did not indorse the second enlargement on the original order:—*Held*, that, as both parties had in effect assented to the enlargement, the award was valid, as the authority of the arbitrator had not expired. *Leggett v. Finlay*, 629

ASSISTANT OVERSEER.

See OVERSEER, 2, 3.

ASSUMPSIT.

1. The defendants, merchants in *London*, entered into an agreement with *J. S.* for the working of mines in *Peru*, for which he was to receive a certain stipulated salary, and also one-fifth share of the profits. *J. S.* was furnished by the defendants with a letter of instructions, a letter of credit enabling him to draw on them for 10,000*l.*, and a power of attorney authorizing him to enter into, transact, complete and execute all contracts or agreements which he might deem expedient for the purpose of obtain-

ing a grant or lease of any mine, or for the purchase of any ore, or of the right to open, dig, or work any mine; and to enter into, make, and execute any deeds, conveyances, &c., that he might deem necessary; and, generally, to do all such acts, &c., as the defendants themselves could do if personally present. *J. S.*, having already raised 10,000*l.* on the letter of credit, obtained a further sum from the plaintiffs in *Peru*, which he applied to the defendants' use, and drew bills on them for the amount. The letter of credit and power of attorney were not shewn to the plaintiffs by *J. S.*, when they made the advances, nor did it appear that they required to see them; neither were the plaintiffs informed by *J. S.* of his having already obtained money on the letter of credit. The defendants having refused to accept the bills:—*Held*, that the plaintiffs were entitled to recover the amount of the advances so made to *J. S.* as money had and received. *Withington v. Herring*, 30

2. The defendant, by an agreement containing words of present demise, let to the plaintiffs certain lands and premises, which the party in possession refused to quit. In *assumpsit* against the defendant for a breach of the agreement, in not delivering possession to the plaintiffs:—*Held*, that the defendant was bound to give possession, as a contract to do so must be implied; and that the plaintiffs were not obliged to bring ejectment against the wrongful occupier. *Coe v. Clay*, 57

3. The plaintiffs, ship owners, contracted by charter-party with *A.*, to take on board a cargo of wheat at *Dantzic*, where *A.* resided, and convey it to *London*, at 4*s.* 6*d.* per quarter. *A.*, not having a cargo ready, entered into a sub-charter-party with *B.* to take corn at 6*s.* per quarter. *B.* consigned the cargo to the defend-

ants under bills of lading, by which the corn was made deliverable to them, or their assigns, on paying freight at 6s. *per* quarter. No reference was made to the sub-charter-party in the bills of lading. *B.* gave the defendants notice not to pay the full freight to the plaintiffs, stating that they were only entitled to freight at 4s. 6d. *per* quarter:—*Held*, that the plaintiffs could only recover freight at that rate, although the defendants, in ignorance of the sub-charter-party or claim of *B.*, had at first promised to pay the full freight of 6s. according to the bills of lading. *Mitchinson v. Begbie*, 442

4. A declaration in *assumpsit* stated, that, in consideration that the plaintiff, at the request of the defendant, would defend any action that might be brought by *J. S.* against the plaintiff, on account of certain money which the plaintiff had delivered to the defendant, he the defendant promised to save the plaintiff harmless from the consequences of such action; that *J. S.* afterwards brought an action, and obtained judgment against the plaintiff; and that a writ of *ca. sa.* was afterwards sued out on the judgment, under which the plaintiff was arrested and imprisoned, and was obliged to pay the sum recovered by *J. S.*, in order to procure his, the plaintiff's, discharge. The defendant took out a summons to stay proceedings on payment of the debt for which the action was brought (the sum recovered), and costs. At the trial, the plaintiff gave no evidence of the writ of *ca. sa.*, but proved the judgment, and that he had been taken in execution and imprisoned until he paid the sum recovered by *J. S.* The Jury found a verdict for the plaintiff for the amount of that sum, and also a further sum by way of damages for the imprisonment:—*Held*, that the plaintiff was only entitled to recover

the former sum, either under the special count or on a count for money paid to the defendant's use; and the Court ordered the verdict to be reduced accordingly. *Quære*, whether the facts as set out in the special count amounted to maintenance? *Williamson v. Henley*, 731

ATTESTING WITNESS.

See WILL, 2.

ATTORNEY.

1. A notice of application to be admitted one of the attorneys of this Court, having been by mistake left at the Chambers of one of the Judges of the Court of *King's Bench*, instead of the Lord Chief Justice's, the Court allowed the applicant to be admitted, on an affidavit declaring the fact. *Ex parte Lambert*, 269

2. In an action for maliciously arresting the plaintiff, and taking him in execution at the defendant's suit, it seems that the latter is liable, although the plaintiff was taken in execution at the instance of the defendant's attorney, and without the knowledge or assent of the defendant. *Jones v. Nicholls*, 12

3. *Quære*—Whether the assignee of an insolvent can maintain an action on the case against an attorney for negligence in preparing a lease for the insolvent, whereby his estate was lessened in value and damaged? *De-lafield v. Freeman*, 704

AUCTION.

1. The defendant, an auctioneer, offered two policies of assurance for sale by auction, and it was stated in the particulars, that the policies would be sold by order of the executors of a mortgagee, and under a power of sale. The plaintiff purchased one of the policies, and deposited part of the purchase-money with the defendant

BAIL IN ERROR.

at the time of the sale:—*Held*, that the vendors were bound to produce a clear and indisputable title:—and the mortgagor having assigned the policy by deed to the mortgagee; and a subsequent deed between the same parties, on a further advance by the mortgagee, *contained a power of sale* if the principal sum were not paid on a given day; and, on a further advance by the mortgagee, a third deed was entered into, by which the interest remaining unpaid was to be converted into principal, *but the power of sale was omitted*; and the vendors declined to procure the concurrence of the mortgagor to the assignment of the policy to the plaintiff:—*Held*, that he was entitled to recover back his deposit, but without interest. *Curling v. Shuttleworth*, 368

AVOWRY.

See REPLEVIN.

AWARD.

See ARBITRATION.

BAIL.

1. Where the defendant became bankrupt after action brought, the Court enlarged the time for him to surrender in discharge of his bail, until a fortnight after he had finished his last examination. *Stead v. Yates*, 272

2. Where, after added bail had justified, the rule for allowance was set aside, on the ground of perjury in one of the bail, who was rejected; the bail below are competent to render their principal at any time before the rule for setting aside the allowance is made absolute, if their names remain on the recognizance as such bail. *Rex v. The Sheriffs of Middlesex*, 594

BAIL IN ERROR.

1. The names of the plaintiff and

BANKRUPT.

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defendant in the original action must be continued in the case of bail in error, until the transcript of the record is carried over to the Court of error. *Smith's Bail*, 242

2. A burgess of a corporation may justify as bail in error, in an action brought against the corporation, if he be not a capital burgess, or a party on the record. *Henley v. Lyme Regis*, 450

BANKRUPT.

1. The 82nd section of the statute 6 Geo. 4, c. 16, is retrospective, and applies to payments made before and at the time of the passing of the act. Therefore, where, before the passing of the act, the bankrupt paid the defendants, who were aware of his insolvency, a sum of money after he had committed an act of bankruptcy, but of which they had no notice:—*Held*, that such payment was protected, and that the assignees were not entitled to recover in an action for money had and received, after the statute 6 Geo. 4 came into operation, although the commission was sued out before the act was passed. *Terrington v. Hargreaves*, 137

2. Where the defendant became bankrupt after action brought, the Court enlarged the time for him to surrender in discharge of his bail, until a fortnight after he had finished his last examination. *Stead v. Yates*, 272

3. In an action of trover by the assignees of a bankrupt, the defendant's attorney admitted that the party had been *duly declared* bankrupt:—*Held*, that the defendant was thereby precluded from objecting to any of the proceedings under the commission, unless he had given notice to dispute it. *Perring v. Tucker*, 557

4. The defendant joined in a lease as surety for the performance of covenants by the lessee. The latter having

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become bankrupt:—*Held*, that the surety was liable in respect of breaches of covenant accruing after the date of the commission, and before the delivery up of the lease by the bankrupt to the lessor, under the provisions of the statute 6 Geo. 4, c. 16, s. 75. *Tuck v. Fyson*, 715

5. The indorsee of a bill of exchange sued two defendants (partners) on an acceptance by one in the name of the firm. Previously to the action, the partner who accepted the bill became bankrupt, and pleaded his certificate in bar, on which the plaintiff entered a *nolle prosequi* as to him, and proceeded to trial against the other:—*Held*, that the bankrupt, having released his interest in the surplus of his effects, was a competent witness for the defendant, to prove the circumstances under which he (the witness) accepted the bill. *Aflalo v. Fourdrinier*, 743

BARGE.

See DISTRESS, 2.

BARON AND FEME.

See HUSBAND AND WIFE.

BILLS OF EXCHANGE.

1. The plaintiff discounted bills of exchange for *J. S.*, and gave him the amount, partly in money and partly in gold (to be used in the manufacture of jewellery). *J. S.* did not indorse some of the bills:—*Held*, that as to those which were not indorsed by *J. S.*, he took them at his own risk. *Evans v. Whyte*, 130

2. A bill of exchange drawn abroad, on a house in London, payable to order, was indorsed generally by the payee to *A.*, who indorsed it as follows:—"Pay to *B.*, or his order, for my use." *B.* applied to his bankers to discount the bill, which they did, and applied the proceeds to the use

BOND.

of *B.*, without making any inquiry or looking at the indorsement:—*Held*, that the indorsement was restrictive; that *B.* was a trustee for *A.*; that the property in the bill remained in the latter; and that he was entitled to recover the amount from the bankers, in an action for money had and received. *Lloyd v. Sigourney*, 229

3. In an action by the indorsee against the drawer of a bill of exchange, it is no defence that the bill was drawn and accepted upon an illegal stock-jobbing transaction, if the indorser received the bill from a third person, for a valuable consideration, and without notice of the circumstances under which it was given. *Day v. Stewart*, 334

4. The defendant having accepted a bill of exchange drawn on him by one of two partners in his own name, for a debt due to both:—*Held*, that the defendant was liable in an action at the suit of an indorsee, as the defendant could not be sued for the debt due from him to the partners, until the bill of exchange was due and dishonoured. *Tomlin v. Lawrence*, 555

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BOND.

1. In debt on a joint and several bond, the obligees declared against

COGNOVIT.

one of three obligors, and set out the condition in the declaration to be for payment by the defendant, *C.*, and *D.*, any or either of them—Plea, *non est factum*. On the production of the bond, it was conditioned for payment by the defendant, *C.*, and *E.*; and it appeared that, after its execution by the defendant, the name of *E.* was substituted for that of *D.*, at the request of the party to whom the money for which the bond was given was advanced, and with the assent of the plaintiffs (the obligees), but without the knowledge or assent of the defendant:—*Held*, that this was a fatal variance, and avoided the bond as against the defendant, although he afterwards assented to the alteration, and paid some instalments due on the bond. *Adams v. Bateson*, 339

BOTTOMRY-BOND.

See SHIP AND SHIPPING.

CHARTER-PARTY.

See ASSUMPSIT, 3.

EVIDENCE, 3.

CHESTER.

See PRACTICE, 11.

COGNOVIT.

1. In an action on the case to recover damages for breaking up a highway, the defendant gave the plaintiff a *cognovit* to confess a judgment for 200*l.*, with a defeasance, that no execution should issue, if the defendant, within a limited period, should reinstate the road according to certain stipulations contained in a plan, and to the satisfaction of a surveyor. The road not being completely reinstated within the time prescribed, the plaintiff sued out execution, and levied the 200*l.* and costs:—*Held*, that the sum of 200*l.* was in the nature of

COMPOSITION-DEED. 769

a penalty, and not of liquidated damages; and the Court referred it to the Prothonotary to ascertain what damages the plaintiff had actually sustained, and what sum he was entitled to recover from the defendant by his neglecting to reinstate the road. *Charrington v. Laing*, 587

COMPOSITION-DEED.

1. The plaintiff having refused to sign an agreement to accept from his debtor a composition of ten shillings in the pound, the brother of the latter offered to supply the plaintiff with goods to the amount of one half of his demand, on which he signed the agreement. The composition was secured by a promissory note, and the goods having been supplied:—*Held*, that, as the stipulation with respect to the goods had been kept secret from the other creditors, it was a fraud upon them; and that the plaintiff could not recover on the note, although he was the last creditor who signed the agreement for the composition, and although the brother of the debtor offered to supply the goods at his own instance, without being requested to do so, either by the plaintiff or by the insolvent. *Knight v. Hunt*, 18

2. The plaintiffs, together with several creditors of the defendant, executed a composition-deed, by which they consented to take ten shillings in the pound, in full for their respective debts. The amount of the sums due to the several creditors was inserted opposite to their respective names, in a schedule at the foot of the deed. The deed contained a general release of the defendant by all the creditors who had signed. The plaintiffs were the holders of two bills of exchange, drawn by the defendant, and overdue when they signed the deed, and they, at the request of the

768 BILLS OF EXCHANGE.

become bankrupt:—*Held*, that the surety was liable in respect of breaches of covenant accruing after the date of the commission, and before the delivery up of the lease by the bankrupt to the lessor, under the provisions of the statute 6 Geo. 4, c. 16, s. 75. *Tuck v. Fyson*, 715

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reasonable lands, supposing the plaintiff to be a wilful trespasser, caused him to be apprehended and taken before a magistrate, who dismissed the complaint. The plaintiff then brought trespass against the defendant, and obtained a verdict, which the Court set aside, and directed a nonsuit to be entered, on the ground that, as the defendant was acting under colour of the statute 7 & 8 Geo. 4, c. 30, he was entitled to notice of action under the 41st section:—*Held* also, that he was entitled to his full costs as between attorney and client, by virtue of that clause. *Wright v. Wales*, 96

2. A rule for judgment as in case of a nonsuit for not proceeding to trial at the Sittings, pursuant to notice, was discharged upon the plaintiff's giving a peremptory undertaking to try at the next Sittings. The rule was silent as to costs. Afterwards, another rule was drawn up by consent of the parties, by which it was ordered that the plaintiff should pay the defendant his costs for not proceeding to trial at the former Sittings, unless the plaintiff should shew sufficient cause to the contrary to the Prothonotary at the time of taxation. The Prothonotary having refused to allow the defendant such costs—the Court refused to direct him to review his taxation. *Partington v. Wyatt*,

316

3. The plaintiffs arrested the defendant for 327*l.*, the alleged balance of an account. The defendant had previously tendered 250*l.* which the plaintiffs refused to accept. The cause and all matters in difference were referred to an arbitrator, who found that 250*l.* only was due to the plaintiffs:—*Held*, that the defendant was not entitled to costs under the statute 43 Geo. 3, c. 46, s. 3, as he did not shew that the arrest was malicious, or that he was held to bail without rea-

DEPOSITIONS.

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sonable or probable cause. *Sherwood v. Taylor*, 641

COVENANT.

1. In an indenture of lease, the lessee covenanted with the lessor, his heirs and assigns, to indemnify the overseers for the time being of the parish in which the premises demised were situate, from all costs and charges by reason of the lessee's taking an apprentice or servant who should thereby gain a settlement within, or become chargeable to the parish:—*Held*, to be a valid covenant, although it was objected that it was unreasonable, in restraint of trade, and contrary to the policy of the poor laws:—*Held* also, that the action was well brought by the executors of the lessor, as the covenant was an express covenant with him personally, and did not run with the land. *Walsh v. Fussell*, 457

CROSS-REMAINDERS.

See DEVISE.

DAMAGE FEASANT.

See DISTRESS, 1.

DECEIT.

See ACTION ON THE CASE, 1.

DECLARATIONS.

See EVIDENCE, 1.

DEMURRER.

See PLEADING.

DEPOSITIONS.

1. A Justice of the Peace should not allow depositions to be framed in the words of a clause in a statute under which the party is committed. *Mills v. Collett*, 242

770 COMPOSITION-DEED.

defendant, only inserted the amount of one of them in the schedule, as he said the plaintiffs might recover the amount of the other from the acceptor; but the latter having refused payment, the plaintiffs sued the defendant as drawer:—*Held*, that they were not entitled to recover, as the concealment of a part of their debt was a fraud on the rest of the creditors; and that the general words of the release were not restrained by a previous recital in the deed, that the defendant was indebted to his creditors in the several sums set opposite to their names in the schedule. *Britten v. Hughes*, 77

3. The defendants entered into an agreement with their creditors, that trustees should be appointed for the purpose of settling the defendants' affairs, by the collection, sale, and division of their estate and effects equally among the creditors, who agreed that the trustees should take a conveyance and assignment of the estate and effects, and manage the defendants' affairs until each creditor should have received full payment of his debt; the surplus to be paid over to the defendants, who agreed to make a conveyance and assignment of all their estates to the trustees, whenever thereunto required; and that all usual and necessary clauses should be inserted in the deed of conveyance. The trustees took possession of the defendants' effects, and paid their creditors ten shillings in the pound. A deed of conveyance was prepared, which the trustees called on the defendants to execute, but which they refused to do, as it did not contain a clause of general release. At the time the deed was tendered, one of the defendants only was present, and the meeting at which it was produced was adjourned, for the purpose of procuring the assent of the other de-

COSTS.

fendant. The plaintiffs (creditors), although they had signed the deed and received ten shillings in the pound, sued the defendants for the residue of their original debt:—*Held*, that the action was premature, as the parties, by entering into the agreement, contemplated a suspension of the right of the creditors to sue: and it seems that a clause of a general release from the creditors in such a deed is a usual and reasonable clause. *Tatlock v. Smith*, 676

CONFIRMATION.

See LEASE, 1.

CONTEMPT.

See PRACTICE, 8.

CORPORATION.

1. *Charles* the first, by letters patent, granted to the mayor and burgesses of *Lyme*, and their successors, the borough, pier, and quay of *Lyme*, with all the liberties and immunities to the same belonging; and directed that the mayor and burgesses, and their successors, should at their own costs repair the pier and quay, and all banks, &c., within the borough:—*Held*, that an individual who had sustained an injury from the banks being out of repair, might maintain an action on the case against the corporation, for the recovery of damages in consequence of such non-repair. *Henley v. Lyme Regis*, 278

2. A burgess of a corporation may justify as bail in error, in an action brought against the corporation, if he be not a capital burgess, or a party on the record. *Henley v. Lyme Regis*, 450

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1. The defendant, a *fen-reeve*, or person having the care of certain com-

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reasonable lands, supposing the plaintiff to be a wilful trespasser, caused him to be apprehended and taken before a magistrate, who dismissed the complaint. The plaintiff then brought trespass against the defendant, and obtained a verdict, which the Court set aside, and directed a nonsuit to be entered, on the ground that, as the defendant was acting under colour of the statute 7 & 8 Geo. 4, c. 30, he was entitled to notice of action under the 41st section:—*Held* also, that he was entitled to his full costs as between attorney and client, by virtue of that clause. *Wright v. Wales*, 96

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sonable or probable cause. *Sherwood v. Taylor*, 641

COVENANT.

1. In an indenture of lease, the lessee covenanted with the lessor, his heirs and assigns, to indemnify the overseers for the time being of the parish in which the premises demised were situate, from all costs and charges by reason of the lessee's taking an apprentice or servant who should thereby gain a settlement within, or become chargeable to the parish:—*Held*, to be a valid covenant, although it was objected that it was unreasonable, in restraint of trade, and contrary to the policy of the poor laws:—*Held* also, that the action was well brought by the executors of the lessor, as the covenant was an express covenant with him personally, and did not run with the land. *Walsh v. Fussell*, 457

CROSS-REMAINDERS.

See DEVISE.

DAMAGE FEASANT.

See DISTRESS, 1.

DECEIT.

See ACTION ON THE CASE, 1.

DECLARATIONS.

See EVIDENCE, 1.

DEMURRER.

See PLEADING.

DEPOSITIONS.

1. A Justice of the Peace should not allow depositions to be framed in the words of a clause in a statute under which the party is committed. *Mills v. Collett*, 242

DEVISE.

1. Devise "to the testator's sons, *Thomas and Samuel*, and their heirs males, then to the testator's four grandsons, share and share all alike, then to the heirs males of all his said grandsons, and then to go to his grandsons' heirs males that part that belonged to their father, and then to them, and then to the last liver, to their heirs males of his said grandsons; and, for want of issue males of his grandsons, to the testator's nephew, and his heirs males, &c.; and, for want of such issue male, to the testator's own right heirs for ever:"—*Held*, that the testator did not intend that any part of his property should go over, until all the issue of his grandsons was extinct; and, therefore, that cross-remainders might be implied. *Doe d. Southouse v. Jenkins*, 59

DISTRESS.

1. The plaintiff distrained the defendant's cattle, *damage feasant*, and went to apprise him of the circumstance, leaving the cattle in a close of the defendant, where they remained half an hour. On the plaintiff's return he drove the cattle from the defendant's close to his own yard, whence they were liberated by the defendant:—*Held*, that this was not a rescue; as the leaving the cattle in the defendant's close was an abandonment of the distress. *Knowles v. Blake*, 214

2. *A.*, by indenture, demised to *B.* a certain wharf adjoining the river *Thames*, described by abutments, with liberty to land and load goods, together with all ways, paths, passages, easements, profits, commodities, and appurtenances whatsoever to the wharf belonging or appertaining:—it was found, by a special verdict, that, by this indenture, the *exclusive use* of the land of the river *Thames*, oppo-

site to, and in front of the wharf, between high and low water-mark, as well when covered with water as dry, for the accommodation of the tenants of the wharf, was demised as appurtenant to the wharf; but that the land itself, between high and low water-mark, was not demised:—*Held*, that barges of *B.*, lying between high and low water-mark, and attached to the wharf by ropes, could not be distrained by *A.* for rent in arrear of the premises demised. *Capel v. Buzzard* (in error), 480

DIVORCE.

See HUSBAND AND WIFE, 1.

DOWER.

1. If a woman leave her husband with her own free will, and afterwards lives in adultery, she forfeits her claim to dower. *Hetherington v. Graham*, 399

2 A plea in bar to a writ of dower, *unde nihil habet*, alleged, that the wife, during her coverture, voluntarily left her husband, and, without his consent, lived away from him in adultery with *W. C.*:—*Held*, sufficient, without alleging that she left with *W. C.* willingly, and that she had been convicted of adultery. *Ibid.*

EJECTMENT.

1. At the trial of an action of ejectment, commenced in 1824, the defendant proved, that, in 1802, the Court of *Chancery* decreed that monies should be raised by sale or mortgage of certain premises, which were assigned to the mortgagee for the residue of a term of 600 years, created in 1794, and that what was found to be due to him should be paid to him. No evidence was adduced by the defendant of any further proceedings in the *Chancery* suit, nor did he shew any title to the premises, but merely proved that some sales took place under the decree, and that he

had purchased certain lots, but which did not appear to form any part of the premises sought to be recovered:—*Held*, that these circumstances were not sufficient to found a presumption that the mortgage term had been surrendered to the owner of the inheritance, as such presumption can only arise where a title has been shewn by the party who calls for the presumption, or the possession is shewn to have been consistent with the existence of the surrender required to be presumed. *Doe d. Harrop v. Cooke*, 411

EVIDENCE.

1. Parol evidence of declarations made by a testator, having a tendency to dis-affirm the disposition of his real property in a will previously executed by him, is not admissible to invalidate such will. *Provis, demandant; Reed, tenant*, 4

3. In a suit by the heir-at-law of a testator, imputations being cast upon the character of a deceased attorney by whom the will was prepared, and who was one of the attesting witnesses, charging him with fraud in the execution of the will:—*Held*, that the devisee might call witnesses to shew the general good character of such attorney. *Ibid.*

2. A copy of an order of the Insolvent Debtors' Court, referring the matters of an insolvent's petition to the Justices at Sessions in *Wales*, in pursuance of the statute 7 Geo. 4, c. 57, s. 41, together with an affidavit of the service of the order upon the creditors, were tendered in evidence under the 76th section of the act, which makes copies of the petition, schedule, order, and proceedings in the matters of the prisoner's petition receivable in evidence, on their being certified by the proper officer, and sealed with the seal of the Court.

The copy of the affidavit was sealed as required by the act, but the copy of the order, which was affixed to the affidavit with a pin, was neither sealed nor certified:—*Held*, that the certificate and seal on the copy of the affidavit was a sufficient verification of both instruments. *Jones v. Nicholls*, 12

3. After the execution of a charter-party, the plaintiff, who was a party to it, entered into an agreement with the attesting witness, by which the latter was to have a share of the profits expected to be derived from the adventure. The witness having refused to release his interest—*Held*, that he was incompetent to prove the execution of the charter-party, and that evidence of his hand-writing was inadmissible. *Hovill v. Stephenson*, 146

4. If a party on being called as a witness in an action of *assumpsit*, admit himself to be a co-contractor with one of the defendants, his testimony is not admissible, to prove the terms on which the contract was made, as such witness is liable to contribute to the costs of the action, and consequently has an immediate interest in the event of the suit. *Hall v. Rix*, 273

5. A short-hand writer having been allowed to refer to his notes, as to the testimony of witnesses at the trial of the indictment:—*Held*, that such evidence was improperly received, as the witnesses themselves ought to have been called. *Willans v. Taylor*, 350

6. An ancient document, signed by the rector of a parish for the time being, setting out the payment of tithes by a *modus*, is admissible in evidence in support of such *modus*, although such document was not produced from the registry of the bishop or archdeacon, but was found among the title deeds of a land-owner in the parish—

on the ground that, as it was evidence against the rector who signed it, it was admissible against his successors. *Maddison v. Nuttall*, 544

7. A paper purporting to be an order of adjudication under the statute 7 Geo. 4, c. 57, for the discharge of an insolvent debtor, is sufficient evidence of such discharge, if it be proved to have been sealed with the seal of the Insolvent Debtors' Court. *Northam v. Latouche*, 646

8. In an action for work and labour, after the plaintiff had closed his case, the defendant called a witness, who stated that there had been a contract in writing between the plaintiff and defendant, which the latter produced, but, it not being stamped, the Judge refused to receive it in evidence:—*Held*, that it was properly rejected: *Fielder v. Ray*, 659

9. In an action by the assignee of an insolvent debtor, certificated copies of the assignment to the provisional assignee, and of the assignment by him to the plaintiff as ultimate assignee, are, by sect. 19 of the stat. 7 Geo. 4, c. 57, sufficient to shew the title of the latter, and his right to sue, without proving that the petition of the insolvent had been filed in the Insolvent Debtors' Court. *Delafield v. Freeman*, 704

10. An insolvent debtor is not a competent witness in an action brought by his assignee, although he offer to release his interest in the surplus of his estate, because his future property is liable to the payment of the debts in his schedule, and he is consequently interested in procuring the recovery of as much money as possible by his assignee. *Ibid.*

11. The indorsee of a bill of exchange sued two defendants (partners) on an acceptance by one in the name of the firm. Previously to the action, the partner who accepted the bill became bankrupt, and pleaded his certificate

in bar, on which the plaintiff entered a *nolle prosequi* as to him, and proceeded to trial against the other:—*Held*, that the bankrupt, having released his interest in the surplus of his effects, was a competent witness for the defendant, to prove the circumstances under which he (the witness) accepted the bill. *Affalo v. Fourdrinier*, 743

EXECUTION.

See PRACTICE, 14.

FIERI FACIAS.

See PRACTICE, 14.

FINES AND RECOVERIES.

1. Where part of the proceedings in a recovery was taken on paper in France, and in the French language, and a translation was written on parchment, and certified by a Notary here to be "a faithful translation."—The Court refused to allow the recovery to pass; but *held*, that all the documents must be taken on parchment. *Nicholas, vouchee*, 28

2. In 1807, a fine was duly proceeded with as far as the *allocatur*, and the clerk of the attorney for the conusors having received money to compound the fine at the alienation office, absconded with it, and neither the attorney nor any of the parties to the fine knew that the money had not been paid, till 1829. The Court permitted the fine to pass as of Trinity Term, 1807, when it ought to have been perfected, on payment of the King's silver as compounded for, on affidavits stating that all the parties interested consented to the fine being passed as of that term, although both the conusors were dead. *Ash, conusor; Gee, conusee*, 602

3. Where more than twelve months had elapsed after the taking of the acknowledgment of the conusors, and one of them had died, the Court would

FRIENDLY SOCIETY.

not allow the fine to pass, unless it was shewn that the heir-at-law, or person beneficially interested, assented to the application. *Ball*, conusor; *Stephens*, conusee, 742

FOREIGN DOCUMENTS.

See FINES AND RECOVERIES, 1.

FRAUDS, STATUTE OF.

See STATUTE OF FRAUDS.

FRIENDLY SOCIETY.

1. By the rules of a Friendly Society, twelve persons were annually chosen as a committee, who were empowered to settle and determine all grievances, differences, and disputes which might arise relative to the affairs of the Society, subject to an appeal to two magistrates by a party grieved; and each member was to pay three shillings annually to the Society's medical attendant. The plaintiff, who had been duly appointed such attendant, was dismissed by the committee, without any previous notice, and another person appointed in his stead, but against his consent, and without any meeting of the members at large. Disputes having arisen respecting the plaintiff's dismissal, upon an application by the committee to two magistrates, they recommended a general meeting of the Society, which was convened accordingly, and a large majority of the members voted for the plaintiff, who sued the stewards of the Society for the allowance received from the members for his services subsequently to his dismissal. The Jury found that the committee did not act *bonâ fide* in dismissing the plaintiff:—*Held*, that, as such dismissal was not a grievance or dispute within the jurisdiction of the committee, the plaintiff was entitled to recover in an action

GUARANTIE.

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for money had and received; and that the stewards were not bound to pay over the allowance received from the members to the person appointed in the plaintiff's stead, although the committee ordered them to do so. *Garner v. Shelley*, 98

GUARANTIE.

1. The defendant signed a guarantee, by which he undertook to be answerable to the plaintiff to the extent of 50*l.*, for any gold he might supply to *J. S.*, a jeweller, for the purpose of carrying on his trade. The plaintiff discounted bills of exchange for *J. S.*, and gave him the amount, partly in money and partly in gold. *J. S.* did not indorse some of the bills, but the whole of the gold was used by him in his trade:—*Held*, that this was not a supply or sale of gold within the meaning of the guarantee, so as to render the defendant liable under it, as the plaintiff became the purchaser of the bills; and that, as to those which were not indorsed by *J. S.*, he took them at his own risk. *Evans v. Whyte*, 130

2. The defendant guaranteed the payment of the price of certain timber sold by the plaintiff to the defendant's son. The plaintiff received part payment from the son, and afterwards made repeated applications for the residue. More than two years having elapsed from the day stipulated for payment, the son gave the plaintiff a bill of exchange, which was dishonoured, and shortly afterwards became bankrupt. The plaintiff did not give the defendant notice of the dishonour of the bill, nor did he inform him of the state of the account, until after the bankruptcy:—*Held*, that the defendant was notwithstanding liable. *Goring v. Edmonds*, 259

3. The defendant addressed a letter to the plaintiff in the following

terms:—"I, the undersigned, do hereby agree to bind myself to be security to you for *J. C.*, late in the employ of *J. P.*, for whatever, while in your employ, you (the plaintiff) may entrust him with, to the amount of 50*l.*, and, in case of any default, to make the same good."—*Held*, that there was a sufficient consideration for the defendant's promise on the face of the letter, as the employment of *J. C.* by the plaintiff was prospective, and the guarantie was given in consideration of the plaintiff's taking him into his service. *Newbury v. Armstrong*, 509

4. The defendant gave the plaintiff the following guarantie, in writing:—"I do hereby agree to guaranty the payment of goods, to be delivered in umbrellas and parasols to *J.* and *E. S.*, according to the custom of their trading with you, in the sum of 200*l.*" The custom of trading between the plaintiff and *J.* and *E. S.* was, to make up monthly accounts of goods delivered, and for *J.* and *E. S.* to give acceptances for the amount of each monthly account:—*Held*, to be a continuing guarantie. *Hargrave v. Smee*, 573

5. The defendant gave the plaintiff the following guarantie:—"I hereby agree to be answerable to Mr. *K.* (the plaintiff), for the amount of five sacks of flour, to be delivered to *W. T.*, payable in one month." The day after the guarantie was given, the plaintiff delivered five sacks of flour to *W. T.* on account of the defendant. When part of the flour had been consumed, *W. T.* complained of its quality. Two days after the first delivery, five other sacks were sent to *W. T.* on account of the plaintiff, and three sacks and a half of the first parcel were afterwards returned to him by *W. T.* It being left to the Jury to say, whether the second delivery was made in substitution of the five sacks first delivered, and they

having found that it was not, the Court refused to disturb the verdict, or grant a new trial. *Kay v. Groves*, 634

HUSBAND AND WIFE.

1. Where the wife obtained a divorce *a mensd et thoro*, by the sentence of the Spiritual Court, for adultery on the part of the husband, and he was ordered, by a decree of that Court, to allow her alimony, by quarterly payments, but he omitted to do so:—*Held*, that he was liable to a tradesman for necessaries supplied to the wife:—*Held*, also, that furniture for a house might be considered as necessaries, provided it were suitable to the rank and income of the wife. *Hunt v. Blaquiére*, 108

2. If a woman leave her husband with her own free will, and afterwards lives in adultery, she forfeits her claim to dower. *Hetherington v. Graham*, 399

INCLOSURE-ACT.

1. Commissioners under an inclosure-act made an allotment to *J. S.*, who, shortly afterwards, conveyed all his lands to trustees for the payment of certain debts and incumbrances:—*Held*, that the allotment passed by the conveyance, although the commissioners did not make their award until three years afterwards. *Doe d. Dixon v. Willis*, 24

INDORSEMENT.

See BILLS OF EXCHANGE.

INSOLVENT DEBTORS.

1. A copy of an order of the Insolvent Debtors' Court, referring the matters of an insolvent's petition to the Justices at Sessions, in *Wales*, in pursuance of the statute 7 *Geo.* 4, c. 57, s. 41, together with an affidavit of the service of the order upon the creditors, were tendered in evidence under the 76th section of the act,

which makes copies of the petition, schedule, order, and proceedings in the matters of the prisoner's petition, receivable in evidence, on their being certified by the proper officer, and sealed with the seal of the Court. The copy of the affidavit was certified and sealed as required by the act; but the copy of the order, which was affixed to the affidavit with a pin, was neither sealed nor certified:—*Held*, that the certificate and seal on the copy of the affidavit was a sufficient verification of both instruments. *Jones v. Nicholls*, 12

2. A voluntary payment by a debtor to his creditor, such debtor being in insolvent circumstances at the time, and within three months before his imprisonment, although in discharge of a *bona fide* debt, is a fraudulent delivery of money, and void under the 32nd section of the statute 7 Geo. 4, c. 57, although the word *payment* is not introduced in that section. *Herbert v. Wilcox*, 515

3. A paper, purporting to be an order of adjudication under the stat. 7 Geo. 4, c. 57, for the discharge of an insolvent debtor, is sufficient evidence of such discharge, if it be proved to have been sealed with the seal of the Insolvent Debtors' Court. *Northam v. Latouche*, 646

4. In replevin, the plaintiff signed interlocutory judgment against the defendant for want of an avowry, and the plaintiff's attorney delivered his bill of costs. The defendant was afterwards arrested by another creditor, and obtained his discharge under the Insolvent Debtors' Act, 7 Geo. 4, c. 57, having inserted the amount of the attorney's bill in his schedule. After the defendant's discharge, the plaintiff executed a writ of inquiry, and sued out a *feri facias* for the amount of the damages in the replevin suit:—*Held*, that the execution was regular, as the words, *debt*

or sum of money, in the 61st section of the statute, are limited to debts due from the insolvent to his creditors at the time of his first imprisonment, and do not apply to unascertained or unliquidated damages. *Wilmer v. White*, 671

5. In an action by the assignee of an insolvent debtor, certificated copies of the assignment to the provisional assignee, and of the assignment by him to the plaintiff as ultimate assignee, are, by sect. 19 of the stat. 7 Geo. 4, c. 57, sufficient to shew the title of the latter, and his right to sue, without proving that the petition of the insolvent had been filed in the Insolvent Debtors' Court. *Delafield v. Freeman*, 706

6. An insolvent debtor is not a competent witness in an action brought by his assignee, although he offer to release his interest in the surplus of his estate; because his future property is liable to the payment of the debts in his schedule, and he is consequently interested in procuring the recovery of as much money as possible by his assignee. *Ibid.*

7. *Quære*—Whether the assignee of an insolvent can maintain an action on the case against an attorney for negligence in preparing a lease for the insolvent, whereby his estate was lessened in value and damaged? *Ibid.*

INSURANCE.

See SHIP AND SHIPPING.

1. The plaintiff being possessed of property determinable on the death of *A.*, was applied to by an agent of an insurance company, to effect an insurance with them on the life of *A.*, to which the plaintiff agreed; but, as he had never seen *A.*, he directed the agent to make the necessary inquiries respecting him. One of the conditions indorsed on the policy was, that a reference should be given to two per-

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sons respecting the state of health of the life to be assured, one of whom was to be his usual medical attendant. The agent of the Company applied to *A.*, who referred him to a medical man who had never attended him as such, he having been visited by a quack doctor on his recovery from fits of intoxication, in which he frequently indulged:—*Held*, that *A.* was impliedly the agent of the plaintiff, and that he was bound by his misstatement to the agent of the office, and, therefore, that it avoided the policy as against the plaintiff, although he was wholly unacquainted with *A.*'s mode of life, but, on the contrary, believed him to be a man of temperate habits, *Everett v. Desborough*, 190

INTERESTED WITNESS.

See EVIDENCE, 3, 4.

JOINT-STOCK COMPANY.

1. In an action of *assumpsit* for goods furnished to a mining company, it appeared that the defendants had paid their deposits on shares, and obtained scrip receipts, which they transferred previously to the commencement of the action; and they attended two meetings of the company, but did not sign the partnership deed. The Jury found that the company originated in fraud, but that neither the plaintiff nor defendants were cognizant of it:—*Held*, that the defendants were liable, by having attended the meetings of the company. *Ellis v. Schmack*, 220

JUSTICE OF THE PEACE.

1. If a person be charged on oath before a magistrate with an offence amounting to felony, and he issues his warrant, and, on the party being brought before him, the charge is substantiated, and the offender is committed to prison, the magistrate

LEASE.

committing is not liable in trespass for false imprisonment, although the charge turns out to be unfounded. Where, therefore, a party was charged under the statute 7 & 8 Geo. 4, c. 30, s. 19, with having maliciously cut down a tree adjoining a dwelling-house, and was committed to prison as a felon, and the person who laid the information did not prosecute:—*Held*, that the magistrate was not liable in trespass, although it appeared on the face of the depositions under which the party was committed, that he was the occupier of the land the tree grew on. *Mills v. Collett*, 242

2. A Justice of the Peace should not allow depositions to be framed in the words of a clause in a statute under which the party is committed. *Ibid.*

3. In a notice of action to a magistrate, the residence of the plaintiff's attorney was described as of *Half-Moon Street, Piccadilly, London*. *Quære*, whether it was sufficient—*Half-Moon Street* being in the county of *Middlesex*. *Ibid.*

LANDLORD AND TENANT.

See LEASE.

REPLEVIN.

1. The defendant, by an agreement containing words of present demise, let to the plaintiffs certain lands and premises which the party in possession refused to quit. In *assumpsit* against the defendant for a breach of the agreement, in not delivering possession to the plaintiffs:—*Held*, that the defendant was bound to give possession, as a contract to do so must be implied; and that the plaintiffs were not obliged to bring ejectment against the wrongful occupier. *Coe v. Clay*, 57

LEASE.

See COVENANT.

1. Receipts by an heir in tail, for

LIBEL.

ten years, of rent reserved in a lease for ninety-nine years granted by his ancestor, a former tenant in tail:—*Held*, to be a confirmation of the lease. *Doe d. Southouse v. Jenkins*, 59

2. By an instrument in writing, *A. B.* agreed to grant, seal, and execute to *C. D.* a legal and effectual lease of premises for a term of years, at a certain annual rent, and subject to covenants by *C. D.*, to pay the rent and taxes, to keep the premises in repair, and to paint them every third year, and leave them in good repair at the end of the term: and *C. D.* agreed to accept the lease upon the above terms, and, in the mean time, and until such lease should be made and executed, to pay the rent, and to hold the premises subject to the covenants above mentioned:—*Held*, that this was an actual demise, and not merely an agreement for a future lease. *Pinero v. Judson*, 497

LETTER OF CREDIT.

See ASSUMPSIT, 1.

LIBEL.

1. In order to justify the publication of a report of a cause tried in a Court of Justice, the report must contain a fair and accurate statement of what took place at the trial. A mere statement by counsel, in his opening to the Jury, unsupported by evidence, is not a fair and impartial report. *Saunders v. Mills*, 524

2. In an action for a libel in a newspaper, the defendant was permitted, under the general issue, to shew, in mitigation of damages, that he had copied the alleged libel from another newspaper, but he was not allowed to shew that it had also previously appeared in several other newspapers. The question of damages in such a case is exclusively a question for the Jury. *Ibid.*

LIQUIDATED DAMAGES. 779

3. In an action for a libel published in a newspaper, charging the plaintiff, a proctor, with having been *thrice* suspended from practice for extortion—the plaintiff alleged, by way of special damage, in the declaration, that his neighbours suspected and believed him to be a person guilty of extortion, and refused to have any transactions or acquaintance with him, as they were accustomed to do previously to the publication of the libel. The defendant pleaded a justification, and alleged in the plea, that the plaintiff had been suspended *once* for extortion:—*Held*, that the plea was bad on demurrer, as it professed to justify the whole of the charge contained in the libel, and did in fact justify a part only. *Clarkson v. Lawson*, 605

LIFE-INSURANCE.

See INSURANCE.

LIMITATION OF ACTION.

1. The time limited for the commencement of actions for any thing done in pursuance of any *local* paving-act, is regulated by the Metropolis general paving-act, 57 Geo. 3, c. xxix. s. 136, which in effect repeals the limitation clause in the *Clack* Liberty paving-act, 52 Geo. 3, c. xiv. s. 122. *Burns v. Carter*, 1

LIQUIDATED DAMAGES.

See COGNOVIT.

1. By articles of agreement between the plaintiff and defendant, the latter agreed to act as a comedian at *Covent Garden* Theatre for four seasons, and to conform to the usual regulations of the theatre; and the plaintiff, as proprietor, agreed to pay the defendant 3*l.* 6*s.* 8*d.* for every night on which the theatre should be open for performance during the four seasons. And the agreement, contained a clause, “that, if either of the parties should in

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anywise omit, neglect, or refuse to fulfil, perform, or keep the agreement, or any part thereof, or any stipulation therein contained, such party should pay to the other 1,000*l.*, to which sum it was agreed that the damages sustained by any such omission, neglect, or refusal, would amount; and which sum was thereby declared to be the liquidated and ascertained amount of the damages, and not a penalty or penal sum, or in the nature thereof:—*Held*, that the sum of 1,000*l.* could not be considered as liquidated damages, as the clause was not limited to breaches of the agreement where the damages would be of uncertain amount, but extended to the breach of any stipulation by either party. *Kemble v. Farren*, 425

LUNATIC.

1. It seems, that, if the defendant in *quære impedit* be a lunatic, the action is properly brought against him and not against his committee. *Tyrell v. Jenner*, 648

MAINTENANCE.

See ASSUMPT, 4.

MALICIOUS ARREST.

1. In an action for maliciously arresting the plaintiff, and taking him in execution at the defendant's suit, it seems that the latter is liable, although the plaintiff was taken in execution at the instance of the defendant's attorney, and without the knowledge or assent of the defendant. *Jones v. Nicholls*, 12

MALICIOUS PROSECUTION.

See ACTION ON THE CASE, 2.

MALICIOUS TRESPASS-ACT.

1. The defendant, a *fen-reeve*, or person having the care of certain commonable lands, supposing the plain-

NOTICE OF ACTION.

tiff to be a wilful trespasser, caused him to be apprehended and taken before a magistrate, who dismissed the complaint. The plaintiff then brought trespass against the defendant, and obtained a verdict, which the Court set aside, and directed a nonsuit to be entered, on the ground, that, as the defendant was acting under colour of the statute 7 & 8 Geo. 4, c. 30, he was entitled to notice of action under the 41st section:—*Held* also, that he was entitled to his full costs as between attorney and client, by virtue of that clause. *Wright v. Wales*, 96

2. Where a party was charged under the 7 & 8 Geo. 4, c. 30, s. 19, with having maliciously cut down a tree adjoining a dwelling-house, and was committed to prison as a felon, and the person who laid the information did not prosecute:—*Held*, that the magistrate was not liable in trespass, although it appeared on the face of the depositions under which the party was committed, that he was the occupier of the land on which the tree grew. *Mills v. Collett*, 242

MEMORANDA, 241, 496.

MODUS.

See TITHES.

MONEY HAD & RECEIVED.

See ASSUMPT, 1.

NOLLE PROSEQUI.

See EVIDENCE, 11.

NOTICE OF ACTION.

1. In a notice of action to a magistrate, the residence of the plaintiff's attorney was described as of *Half-Moon Street, Piccadilly, London*. *Quære* whether it was sufficient—*Half-Moon Street* being in the county of *Middlesex*. *Mills v. Collett*, 242

PARISH OFFICER.

OVERSEER.

1. The Court granted a writ of privilege to exempt the deputy to the clerk of the treasury from serving the office of overseer of the poor in the parish in which he resided, the duties of that office being incompatible with his personal attendance on the Court. *Ex parte Jefferies*, 460

2. An assistant overseer, appointed under the statute 69 Geo. 3, c. 12, is within the provisions of the statute 17 Geo. 2, c. 3, and liable to a penalty for not producing a poor-rate to the inhabitant of a parish, when duly required so to do. *Edwards v. Bennett*, 749

3. A count in a declaration for penalties under the statute 17 Geo. 2, c. 3, alleged that the plaintiff was an inhabitant of the parish of A., and that the defendant was the assistant overseer of that parish; that a rate for the relief of the poor was made, allowed, and published; and that, at a seasonable time, the plaintiff requested the defendant, as such assistant overseer, to permit him, the plaintiff, to inspect the rate, and tendered one shilling for the same; and that, although the defendant, as such assistant overseer, had the rate in his possession, he would not permit the plaintiff to inspect it:—*Held* (on writ of error brought) to be sufficient after verdict, because the allegation that the defendant was assistant overseer, could only be proved by the production of the warrant for his appointment, in which his duties must be specified; and that, if he had the rate in his custody as such assistant overseer, it might be presumed that it was his duty to produce it, when its inspection by a parishioner was duly demanded. *Ibid.*

PARISH OFFICER.

See OVERSEER.

PLEADING.

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PARTNERS.

See EVIDENCE, 11.

1. The defendants, merchants in London, entered into an agreement with I. S., for the working of mines in Peru, for which he was to receive a certain stipulated salary, and also one fifth share of the profits—*Quære* whether the agreement that I. S. should receive a share of the profits, constituted him a partner with the defendants. *Withington v. Herring*, 30

PAVING-ACT.

1. The time limited for the commencement of actions for any thing done in pursuance of any local paving-act, is regulated by the Metropolis general paving-act, 57 Geo. 3, c. xxix. s. 136, which in effect repeals the limitation clause in the *Chancery* Liberty paving-act, 52 Geo. 3, c. xiv. s. 122. *Burns v. Carter*, 1

PAYMENT.

See BANKRUPT, 1.

PENALTY.

See COGNOVIT.

PLEADING.

1. A plea in bar of dower, *unde nihil habet*, alleged, that the wife, during her coverture, voluntarily left her husband, and, without his consent, lived away from him in adultery with W. C.:—*Held*, sufficient, without alleging that she left with W. C. willingly, and that she had been convicted of adultery. *Hetherington v. Graham*, 399

2. To a declaration of *assumpsit*, for money lent, money paid, and money had and received, the Court would not allow the defendant to plead, first, *non assumpsit*, and secondly, that the plaintiff and divers other persons had become shareholders and partners in a certain compe-

ny, and that the several sums alleged to have been lent, paid, and had and received by the defendant, to the plaintiff's use, were lent, paid, and had and received by the defendant and the other partners in the company, for and towards the purposes and concerns of the company; that the sums became and were part of the stock and effects of the company, and were common to all the partners and shareholders therein: as the defendant might give in evidence all such matters under the general issue.

Hammond v. Teague, 474

3. In a declaration of *assumpsit* for the breach of a warranty of the soundness of the defendant's mare, the plaintiff, in his declaration, alleged, that, in consideration that he would deliver a horse of his to the defendant, and also pay him a certain sum in exchange for a mare of the defendant's, he undertook that she was sound. In order to prove the warranty of the defendant's mare, the plaintiff produced a receipt written by the defendant, and given on the payment of the money, in which it was stated that both the horse and mare were warranted sound:—*Held*, that the declaration could not be supported, as it did not set out the whole of the consideration, the plaintiff not having alleged that he had warranted his horse to be sound. *Cross v. Bartlett*, 537

4. In an action for a libel published in a newspaper, charging the plaintiff, a proctor, with having been *thrice* suspended from practice for extortion, the defendant pleaded a justification, and alleged in the plea, that the plaintiff had been suspended *once* for extortion:—*Held*, that the plea was bad on demurrer, as it professed to justify the whole of the charge contained in the libel, and did in fact justify a part only. *Clarkson v. Lawson*, 605

5. A count in a declaration for penalties under the statute 17 Geo: 2, c. 3, alleged that the plaintiff was an inhabitant of the parish of A., and that the defendant was the assistant overseer of that parish; that a rate for the relief of the poor was made, allowed, and published, and that, at a seasonable time, the plaintiff requested the defendant, as such assistant overseer, to permit him, the plaintiff, to inspect the rate, and tendered one shilling for the same; and that although the defendant, as such assistant overseer, had the rate in his possession, he would not permit the plaintiff to inspect it:—*Held* (on writ of error brought) to be sufficient after verdict, because the allegation that the defendant was assistant overseer could only be proved by the production of the warrant for his appointment, in which his duties must be specified; and that, if he had the rate in his custody as such assistant overseer, it might be presumed that it was his duty to produce it, when its inspection by a parishioner was duly demanded. *Edwards v. Bennett*, 749

POOR LAWS.

See COVENANT.

POSTEA.

See PRACTICE, 6.

POWER OF ATTORNEY.

See ASSUMPSIT, 1.

PRACTICE.

See REGULE GENERALES.

VARIANCE.

1. In a notice of action to a magistrate, the residence of the plaintiff's attorney was described as of *Half-Moon Street, Piccadilly, London. Quare*, whether it was sufficient—*Half-Moon Street* being in the county of *Middlesex*. *Mills v. Collett*, 242

2. The names of the plaintiff and defendant in the original action must be continued in the case of bail in error, until the transcript of the record is carried over to the Court of error. *Smith's Bail*, 242

3. An affidavit of debt, stating that the defendant was indebted to the plaintiff in a certain sum, for goods sold and delivered to the defendant, and at his request, is insufficient, as it is necessary to allege that the goods were sold and delivered by the plaintiff to the defendant. *Snell v. Anderton*, 269

4. A notice of application to be admitted one of the attornies of this Court, having been by mistake left at the Chambers of one of the Judges of the Court of *King's Bench*, instead of the Lord Chief Justice's, the Court allowed the applicant to be admitted on an affidavit declaring the fact. *Ex parte Lambert*, 269

5. Where the defendant became bankrupt after action brought, the Court enlarged the time for him to surrender in discharge of his bail, until a fortnight after he had finished his last examination. *Stead v. Yates*, 272

6. In an action on the case, charging the defendants (a corporate body) with the non-repair of sea-banks, the declaration contained five counts, the two first stating the defendants' liability to repair, by virtue of a charter from the Crown, and the others by prescription, and *ratione tenuræ*. At the trial, a verdict was taken for the plaintiff, by consent, on the two first counts, and the Jury were discharged as to the other three. The Court, on the application of the plaintiff, ordered the *postea* to be amended, and the verdict to be entered on the first count only, although the Judge who tried the cause declined to interfere:—on the grounds that the evidence was applicable to both counts, and that separate damages could not have been

found or assessed. *Henley v. Lyme Regis*, 310

7. A rule for judgment as in case of a nonsuit for not proceeding to trial at the Sittings pursuant to notice, was discharged, upon the plaintiff's giving a peremptory undertaking to try at the next Sittings. The rule was silent as to costs. Afterwards, another rule was drawn up by consent of the parties, by which it was ordered that the plaintiff should pay the defendant his costs for not proceeding to trial at the former Sittings, unless the plaintiff should shew sufficient cause to the contrary to the Prothonotary at the time of taxation. The Prothonotary having refused to allow the defendant such costs—the Court refused to direct him to review his taxation. *Partington v. Wyatt*, 316

8. In order to bring a party into contempt, for not attending at a trial as a witness at the Sittings, in obedience to a *subpœna*, the writ must specify the place at which the cause is to be tried, viz. *Westminster-Hall*, or *Guildhall*. *Milsom v. Day*, 333

9. A burgess of a corporation may justify as bail in error, in an action brought against the corporation, if he be not a capital burgess, or a party on the record. *Henley v. Lyme Regis*, 450

10. The Court granted a writ of privilege to exempt the deputy to the clerk of the treasury from serving the office of overseer of the poor in the parish in which he resided, the duties of that office being incompatible with his personal attendance on the Court. *Ex parte Jefferies*, 450

11. A writ of *testatum capias ad respondendum* was directed to the Chamberlain of the county palatine of *Chester*, and served by the plaintiff's attorney upon the defendant, who resided within the city of *Chester*:—*Held*, irregular, as the plaintiff's

attorney did not procure the Chamberlain's mandate to the Sheriff of the county of that city; and the Court set aside the writ. *Shrensbury (Earl) v. Haycroft*, 471

12. If an affidavit be sworn by two or more deponents, their names must be written in the *jurat*. *Houlden v. Fusson*, 559

13. A new rule to plead is necessary to be given by the plaintiff on amendment of his declaration in the vacation succeeding the Term in which the declaration was delivered, although the plaintiff paid the costs of the amendment. *Addis v. Thomas*, 560

14. Where the defendant died after the execution of a writ of *fiery facias*, the Court would not allow it to be amended by inserting the *testatum* clause, as the interests of the personal representative might be affected by such insertion. *Phillips v. Tanner*, 568

15. An affidavit of debt made by the plaintiff, stated, that the defendant was indebted to him in the sum of 225*l.*, upon a bill of exchange drawn by *M. J. D.* upon, and accepted by the defendant, and indorsed by *M. J. D.* to the plaintiff, and due at a day then past:—*Held*, sufficient, although it did not state that the bill was payable to *M. J. D.*, or his order, because, if the plaintiff had no interest in the bill, perjury might be assigned on such affidavit. *Hughes v. Brett*, 566

16. Where, after added bail had justified, the rule for allowance was set aside on the ground of perjury in one of the bail, who was rejected; the bail below are competent to render their principal at any time before the rule for setting aside the allowance is made absolute, if their names remain on the recognizance as such bail. *Rex v. The Sheriff of Middlesex*, 594

QUARE IMPEDIT.

17. It seems, that, if the defendant in *quare impedit* be a lunatic, the action is properly brought against him, and not against his committee. *Tyrell v. Jenner*, 648

18. In an action for work and labour, after the plaintiff had closed his case, the defendant called a witness, who stated that there had been a contract in writing between the plaintiff and defendant, which the latter produced, but, it not being stamped, the Judge refused to receive it in evidence:—*Held*, that it was properly rejected; but the Court granted a new trial, on payment of costs, in order that the defendant might have an opportunity of producing the instrument duly stamped. *Fielder v. Ray*, 659

PRIVILEGE, WRIT OF.

See PRACTICE, 10.

PROMISSORY NOTES.

1. "Received of *A. B.* 150*l.*, which I promise to pay on demand, with interest," is a promissory note, and requires to be stamped as such. *Ashby v. Ashby*, 186

2. An instrument in these words—"On demand, we jointly and severally promise to pay *J. G.*, or order, 100*l.*, with lawful interest for the same from the date hereof"—requires only a promissory note stamp of 3*s.* 6*d.*, as it is distinguishable from a note payable to bearer on demand, which may be re-issued after payment. *Armitage v. Berry*, 211

PROMOTIONS, 241, 496.

QUARE IMPEDIT.

1. In *quare impedit*, the plaintiff sued out a writ of summons against the defendant, to which the Sheriff returned *nihil*. A writ of attachment was then issued, which recited that the defendant had been summoned to appear on the day the writ of sum-

mons was made returnable. The attachment was also returned *nihil*. The plaintiff then issued a *distringas* into *Kent* (where the church was situate), with a direction to the Sheriff to return *nulla bona*. A *testatum distringas* was then issued into *Middlesex* (where the defendant resided), by which the Sheriff was directed to levy 40s. The plaintiff afterwards entered up judgment for default of the defendant's appearance:—*Held*, that the whole of the proceedings subsequent to the writ of summons were irregular, as the attachment recited that the defendant had been summoned, when in fact he had not. *Tyrell v. Jenner*, 648

2. It seems, that, if the defendant in *quare impedit* be a lunatic, the action is properly brought against him, and not against his committee. *Ibid.*

RECOVERIES.

See FINES AND RECOVERIES.

REGULÆ GENERALES, 761.

REPLEVIN.

1. Although a landlord may avow generally for rent in arrear, under the statute 11 *Geo. 2*, c. 19, s. 22, yet the terms of the contract under which the tenant holds must be truly stated in the avowry. Where, therefore, the defendant made cognizance as bailiff of *J. S.*, whose tenant he alleged the plaintiff to be, under a demise before then made to the plaintiff at a certain yearly rent; and the plaintiff pleaded, *non tenuit, modo et forma*:—*Held*, that the cognizance was not supported by proof of a conveyance under which *J. S.* claimed, and which purported to have been made by three trustees, but was executed by two only; as *J. S.* thereby only took two thirds of the premises, as tenant in common with the trustees who had

omitted to execute the deed. *Philpott v. Dobbinson*, 320

REPORTS.

1. In order to justify the publication of a report of a cause tried in a Court of Justice, the report must contain a fair and accurate statement of what took place at the trial. A mere statement by counsel, in his opening to the Jury, unsupported by evidence, is not a fair and impartial report. *Saunders v. Mills*, 524

RESCUE.

See DISTRESS, 1.

RESTRAINT OF TRADE.

1. In an indenture of lease, the lessee covenanted with the lessor, and his heirs and assigns, to indemnify the overseers for the time being of the parish in which the demised premises were situate, from all costs and charges by reason of the lessee's taking an apprentice or servant who should thereby gain a settlement within or become chargeable to the parish:—*Held* to be a valid covenant, although it was objected that it was unreasonable, in restraint of trade, and contrary to the policy of the poor laws. *Walsh v. Russell*, 457

RULE TO PLEAD.

See PRACTICE, 13.

SALE BY AUCTION.

See AUCTION.

SEA-WALLS.

1. *Charles* the first, by letters patent, granted to the mayor and burgesses of *Lyme*, and their successors, the borough, pier, and quay of *Lyme*, with all the liberties and immunities to the same belonging; and directed that the mayor and burgesses, and their successors, should at their own costs repair the pier and quay, and all banks, &c., within the borough:—

Held, that an individual who had sustained an injury from the banks being out of repair, might maintain an action on the case against the corporation, for the recovery of damages in consequence of such non-repair. *Henley v. Lyme Regis*, 278

SHIP AND SHIPPING.

1. The master of a ship in a foreign port, by an instrument under seal, bound himself, the ship, freight, and cargo, for the re-payment of money advanced for her repairs, with 12*l.* per cent. bottomry premium, in eight days after his arrival in London; and the vessel, freight, and cargo, were to be liable, whether she arrived there or not. The party who advanced the money effected an insurance on the ship and cargo, and his interest was described to be on bottomry, free from average, and without benefit of salvage:—*Held*, that this was not a bottomry contract, as the claim of the lender did not depend upon the risk or perils of the voyage, as the vessel was to be liable whether she arrived at London or not; and the bond and interest being described as on bottomry in the declaration, it was a misdescription, and that the assurer could not recover. *Simonds v. Hodgson*, 385

SHORT-HAND NOTES.

1. A short-hand writer having been allowed to refer to his notes, as to the testimony of witnesses at the trial of an indictment:—*Held*, that such evidence was improperly received, as the witnesses themselves ought to have been called. *Willans v. Taylor*, 350

STAMPS.

1. "Received of *A. B.* 150*l.*, which I promise to pay on demand, with interest," is a promissory note,

and requires to be stamped as such. *Ashby v. Ashby*, 186

2. An instrument in these words—
"On demand, we jointly and severally promise to pay *J. G.*, or order, 100*l.*, with lawful interest for the same from the date hereof"—requires only a promissory note stamp of 3*s.* 6*d.*, as it is distinguishable from a note payable to bearer on demand, which may be re-issued after payment. *Armitage v. Berry*, 211

3. In an action for work and labour, after the plaintiff had closed his case, the defendant called a witness, who stated that there had been a contract in writing between the plaintiff and defendant, which the latter produced, but, it not being stamped, the Judge refused to receive it:—*Held*, that it was properly rejected. *Fielder v. Ray*, 659

STATUTES.

Edw. 1.

13. c. 34. (Westminster 2nd.) Adultery. 400

Hen. 8.

23. c. 5. Sewers. 305

Jac. 1.

21. c. 16. Limitations, Statute of. 619

Car. 2.

29. c. 3, s. 5. Attestation of Wills. 691

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6. c. 18. Bottomry. 393

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11. c. 19, s. 8. Distress. 487

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17. c. 3, s. 3. Overseers. 749

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33. c. 54. Friendly Societies. 105

43. c. 46, s. 3. Costs. 641

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52. c. xiv. Local Paving-Act.	1
55. c. 184, Sched. part 1. Stamps.	186, 211
57. c. xxix. Metropolis Paving-Act.	1
59. c. 12, s. 7. Overseers.	453, 749
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7 & 8. c. 30, s. 19. Malicious Trespass-Act.	242
s. 41. —————	96
9. c. 14. Parol Promise.	619

STATUTE OF FRAUDS.

See WILL, 2.

1. The first section of the statute 9 Geo. 4, c. 14, enacts, that, in actions grounded on contract, no acknowledgment shall be deemed sufficient evidence of a new or continuing contract, unless such acknowledgment be in writing, and signed by the party chargeable:—*Held*, that that clause has a retrospective operation, and applies to a parol acknowledgment made before the provisions of the statute came into effect, although the acknowledgment was made before the passing of the act. *Towler v. Chatterton*, 619

STOCK-JOBGING.

1. In an action by the indorsee against the drawer of a bill of exchange, it is no defence that the bill was drawn and accepted upon an illegal stock-jobbing transaction, if the indorsee received the bill from a third person for a valuable consideration,

TITHES.

787

and without notice of the circumstances under which it was given. *Day v. Stewart*, 334

3. Differences in consols do not necessarily apply to time bargains, but may refer to a *bond fide* sale and delivery of stock. *Ibid*.

SUBPENA.

1. In order to bring a party into contempt for not attending at a trial as a witness at the Sittings, in obedience to a *subpœna*, the writ must specify the place at which the cause is to be tried, *viz. Westminster-Hall* or *Guildhall*. *Milsom v. Day*, 333

SURETY.

1. The defendant joined in a lease as surety for the performance of covenants by the lessee, the latter having become bankrupt:—*Held*, that the surety was liable in respect of breaches of covenant accruing after the date of the commission, and before the delivery up of the lease by the bankrupt to the lessor, under the provisions of the statute 6 Geo. 4, c. 16, s. 75. *Tuck v. Fyson*, 715

SURRENDER.

See EJECTMENT.

TAXATION OF COSTS.

See COSTS.

PRACTICE, 7.

TIME BARGAINS.

See STOCK-JOBGING, 2.

TIME TO RENDER.

See BAIL, 1.

TITHES.

1. An antient document, signed by the rector of a parish for the time being, setting out the payment of tithes by a *modus*, is admissible in evidence

in support of such *modus*, although such document was not produced from the registry of the bishop or arch-deacon, but was found among the title-deeds of a land-owner in the parish—on the ground that, as it was evidence against the rector who signed it, it was admissible against his successors. *Maddison v. Nuttall*, 544

TRANSLATION.

See FINES AND RECOVERIES, 1.

TRESPASS.

See MALICIOUS TRESPASS ACT.

1. If a person be charged on oath before a magistrate with an offence amounting to a felony, and he issues his warrant, and, on the party being before him, the charge is substantiated and the offender is committed to prison, the magistrate committing is not liable in trespass for false imprisonment, although the charge turns out to be unfounded. *Mills v. Collett*, 242

USE AND OCCUPATION.

1. An action may be maintained for use and occupation, if a party hold premises under a contract or agreement; and actual occupation is not necessary. *Pinero v. Judson*, 497

USURY.

1. On the discount of bills of exchange, one half of the amount was paid in cash, and goods were supplied for the other half. The goods were charged an extra price *per month*, according to the length of time the bills had to run, and interest was charged on the money advanced, at the rate of 5*l. per cent.* But the discounts being *bona fide*, and if bills had not been given the same charge would have been made for credit on

the goods:—*Held*, that the transaction was not usurious. *Evans v. Whyte*, 130

VARIANCE.

1. In debt on a joint and several bond, the obligees declared against one of three obligors, and set out the condition in the declaration to be for payment by the defendant, *C.*, and *D.*, any or either of them—*Plea, non est factum.* On the production of the bond, it was conditioned for payment by the defendant, *C.*, and *E.*; and it appeared that, after its execution by the defendant, the name of *E.* was substituted for that of *D.*, at the request of the party to whom the money for which the bond was given was advanced, and with the assent of the plaintiffs (the obligees), but without the knowledge or assent of the defendant:—*Held*, that this was a fatal variance, and avoided the bond as against the defendant, although he afterwards assented to the alteration, and paid some instalments due on the bond. *Adams v. Bateson*, 339

2. In a declaration of *assumpsit* for the breach of a warranty of the soundness of the defendant's mare, the plaintiff in his declaration alleged, that, in consideration that he would deliver a horse of his to the defendant, and also pay him a certain sum, in exchange for a mare of the defendant's, he undertook that she was sound. In order to prove the warranty of the defendant's mare, the plaintiff produced a receipt written by the defendant, and given on payment of the money, in which it was stated that both the horse and mare were warranted sound:—*Held*, that the declaration could not be supported, as it did not set out the whole of the consideration, the plaintiff not having alleged that he had warranted his horse to be sound. *Cross v. Bartlett*, 537

WILL.

VOLUNTARY PAYMENT.

See *INSOLVENT DEBTORS*, 2.

WARRANTY.

See *PLEADING*, 3.

1. Where a person manufactures an article, and sells it for a particular purpose, the law implies a warranty that it is fit and proper for that purpose. Therefore, where the defendant supplied copper sheathing for the plaintiff's vessel, which turned out to be defective in a short time after it was used, and the Jury found that the decay was occasioned by some intrinsic defect in the quality:—*Held*, that the plaintiff was entitled to recover damages in an action on the case in the nature of deceit, although no fraud was imputed to the defendant; for that, as he manufactured the copper and knew the purpose to which it was to be applied, and said, "he would supply the plaintiff well," it amounted to a warranty that it should be fit for that purpose. *Jones v. Bright*, 155

WILL.

1. Parol evidence of declarations made by a testator, having a tendency to disaffirm the disposition of his real property in a will previously executed by him, is not admissible to invalidate such will. *Provis*, demandant; *Reed*, tenant, 4

WRIT OF PRIVILEGE. 789

2. A testator wrote and signed his will, by which he devised his real estates. He afterwards requested two persons to sign their names to it, which they did in his presence, but they did not see the signature of the testator, nor did he ever inform them of the nature of the instrument they had signed. Some time afterwards, the testator requested a third person to sign his name, which he did in the presence of the testator, who told him that the paper in question was his will. Immediately above the names of the witnesses, there was written by the deviser, "in the presence of us as witnesses thereto:"—*Held*, that this was a sufficient attestation and subscription of the will by the three witnesses, within the statute of frauds. *British Museum v. White*, 689

WITNESS.

See *EVIDENCE*.

1. In order to bring a party into contempt for not attending at a trial as a witness at the Sittings, in obedience to a *subpoena*, the writ must specify the place at which the cause is to be tried, *viz. Westminster-Hall* or *Guildhall*. *Milsom v. Day*, 333

WRIT OF PRIVILEGE.

See *PRACTICE*, 10.

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